(17,617.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 503.

FRED BARDES, TRUSTEE OF THE ESTATE OF FRANK T. WALKER, BANKRUPT, APPELLANT,

vs.

THE FIRST NATIONAL BANK OF HAWARDEN, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 25, 1900.

1 In United States District Court, Northern District of Iowa, Western Division.

FRED BARDES, Trustee of Estate of Frank T. Walker, Bankrupt,
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA, ET AL. } In Equity.

Be it remembered that this case came up for hearing before the United States district court for the northern district of Iowa, western division, upon a bill of complaint in equity filed by Fred Bardes, trustee of the estate of Frank T. Walker, who had been adjudged to be a bankrupt upon his own petition, filed March 1, 1899, in this court, sitting in bankruptcy, in the western division of this district.

The defendants to the bill are The First National Bank of Hawarden, Iowa, a banking corporation created under the act of Congress commonly known as the national banking act, its place of business being at Hawarden, Sioux county, Iowa; also Frederick E. Watkins, J. A. Moody, A. Melrose, and L. K. Williams, citizens of the State of South Dakota, and Charles R. Allen, a citizen of Iowa, residing at Hawarden, and the general purpose of the bill is to secure a decree setting aside a transfer of a stock of goods by the bankrupt to the defendants, and to compel the defendants to account for the goods or their proceeds, on the ground that the transfer was in fraud of the provisions of the bankrupt act and in fraud of the creditors of the bankrupt, it being averred that the stock of goods so transferred by the bankrupt was of the value of thirty-five hundred dollars.

To this bill the defendants interposed a demurrer on the ground that this court could not take jurisdiction of the case, it being a suit brought by the trustee against third parties, and as the bankrupt could not have sued the defendants in this court if the proceedings in bankruptcy had not been instituted, therefore the court cannot entertain jurisdiction of the action brought by the trustee, and the question of the jurisdiction of the court having been thus put in issue, and this court desiring to obtain the opinion and instruction of the Supreme Court of the United States for its guidance in the premises, hereby certifies to the Supreme Court for its consideration and determination the following questions:

1st. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankrupt act of 1898, control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties or to set aside transfers of property to third parties alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors?

2nd. Can the district courts of the United States under any cir-

cumstances entertain jurisdiction over suits brought by trus-
2 tees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the proceedings in bankruptcy?

3rd. Can this court, being the district court for the northern district of Iowa, take jurisdiction over the suit as it now stands on the record?

4th. If the complainant should dismiss the suit as to the defendants living in Iowa, thus making it a suit between citizens of Iowa, on the one hand, and citizens of South Dakota, on the other, and involving over $2,000, exclusive of interests and costs, would jurisdiction exist in this court?

O. P. SHIRAS,
District Judge for Northern District of Iowa.

And it is further ordered that the transcript to be certified by the clerk of this court to the Supreme Court shall contain the bill of complaint, the demurrer filed thereto, and the foregoing certificate.

O. P. SHIRAS, *Judge.*

In the District Court of the United States in and for the Northern District of Iowa, Western Division.

In the Matter of the Estate of FRANK T. WALKER, Bankrupt.

FRED BARDES, Trustee, Complainant,
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA; The Bank of Alcester, of Alcester, South Dakota, and Charles R. Allen, Defendants. } In Bankruptcy.

To the judges of the district court of the United States for the northern district of Iowa, western division, in equity:

Fred Bardes, trustee for the creditors of Frank T. Walker, bankrupt, of Sioux City, Iowa, a citizen of the State of Iowa and of the United States, brings this his bill into this court of bankruptcy against the First National Bank of Hawarden, Iowa, which is a corporation created and existing in due form of law under and by virtue of the acts of Congress relating to national banks; against the Bank of Alcaster, of Alcester, South Dakota, a copartnership, whose principal place of business is at Alcester, South Dakota, and which copartnership is composed of Frederick E. Watkins, J. A. Moody, A. Melrose, and L. K. Williams, and against Charles R. Allen, a resident and citizen of Hawarden, Iowa.

And thereupon your orator complains and says that on the 14th day of January, 1899, the said Frank T. Walker was engaged, at Hawarden, Iowa, in the business of selling, at retail, clothing, hats, caps, boots, shoes, rubber goods, and other articles of merchandise usually kept in a general clothing store, and that the said Frank T. Walker at said time was the owner of and possessed a similar stock of clothing and merchandise at Alcester, in the State of South Dakota.

3 And your orator further shows that at said time the said stock of clothing and merchandise possessed at Alcester, South Dakota, was of the reasonable value of thirty-five hundred dollars.

And your orator further shows that at said time and on the 16th day of January, 1899, the said Frank T. Walker was indebted to various persons for goods, wares, and merchandise previously sold and delivered to him in the sum of about twelve thousand dollars, and was indebted to the said First National Bank of Hawarden, Iowa, in the sum of about one thousand dollars for money previously borrowed from the said First national bank, and was indebted to the Bank of Alcester, of Alcester, South Dakota, a copartnership composed of various persons, in the sum of about four hundred and fifty dollars, and that at said time and on the 16th day of January, 1899, the said Frank T. Walker was insolvent and unable to liquidate his indebtedness aforesaid.

And your orator further shows that on the 16th day of January, 1899, the said Frank T. Walker made a pretended sale of his said stock of clothing and merchandise owned and possessed by him at Alcester, South Dakota, to one Charles R. Allen for the sum of about seventeen hundred and sixty-four dollars, which amount was evidenced by a promissory note executed by the said Charles R. Allen to the said Frank T. Walker on the said date; which promissory note was without interest and matured on or about the first day of August, 1899.

And your orator further shows that on the said 16th day of January, 1899, and at the time of the said sale of said stock of clothing and merchandise by the said Frank T. Walker to the said Charles R. Allen, the said Frank T. Walker made a pretended sale and delivery of said promissory note, by endorsement thereon, to the said First National Bank of Hawarden, Iowa, for the sum of about sixteen hundred and twenty-nine and $\frac{35}{100}$ dollars, and that at said time the said First National Bank of Hawarden, Iowa, paid to the said Walker the sum of about one hundred and seventy-five dollars in cash for said promissory note and applied the balance of said note to the discharge of the indebtedness of said Walker to the said First National Bank of Hawarden, Iowa, and to the said Bank of Alcester, of Alcester, South Dakota.

And your orator further complains and shows upon information and belief that by the pretended sale of said stock of merchandise to the said Allen and the execution of said note to the said Walker, and the sale and delivery thereof to the said First National Bank of Hawarden, Iowa, the said Walker intended to give a preference to the said First National Bank of Hawarden, Iowa, and to the said Bank of Alcester, creditors of the said Walker, over and above the other credits of the said Walker, and the said Charles R. Allen, the said Bank of Alcester, and the said First National Bank of Hawarden, Iowa, at the time of the pretended sale and endorsement of said note and the payment of the sum thereon and the discharge of the said indebtedness due the said First National Bank of Hawarden, Iowa,

and the said Bank of Alcester, South Dakota, had reasonable
4 cause to believe and did believe that said Walker was insolvent, and that it was the intention thereby to give a preference to the said First National Bank of Hawarden, Iowa, and the said Bank of Alcester, South Dakota, over and above the other creditors of the said Walker, and participated in said intention to give a preference, as aforesaid, fully knowing said Walker was insolvent, in fraud of the acts of Congress of the United States relating to bankruptcy.

And your orater further shows that about the 27th day of January, 1899, and within four months after said preference, a petition was filed in this cause by Friend Brothers Clothing Company of Milwaukee, Wisconsin, and Straw & Ellsworth Manufacturing Company of Milwaukee, Wisconsin, both corporations organized and existing under the laws of the State of Wisconsin, and by Lehman Aarons, a sole trader, under the name and style of Lehman Aarons & Company, of Milwaukee, Wisconsin, praying that service of said petition, with subpœna, be made upon said Frank T. Walker, as provided in the acts of Congress relating to bankruptcy, and that said Walker be adjudged by the court to be a bankrupt within the purview of said acts.

And your orator further states that about the first day of March, 1899, the said Frank T. Walker was adjudged by the court to be a bankrupt, as in said petition prayed, and at the first meeting of the creditors of said bankrupt, held about the 27th day of March, 1899, and not more than thirty days after said adjudication, at Orange City, in the county of Sioux and State of Iowa, in which county the said bankrupt had his principal place of business and resided and had his domicile, your orator was by the creditors of said bankrupt duly elected and appointed sole trustee of the estate of the said bankrupt, and about the 3rd day of April, 1899, and within ten days after the said appointment, qualified as said trustee by entering into bond to the United States, with sureties approved by the court, conditioned for the faithful performance of his official duties as said trustee; and your orator further shows that said appointment is still in force and is unrevoked, and that he now is the duly elected, qualified, and acting sole trustee of the estate of the said bankrupt.

And your orator further charges and alleges upon his information that the said defendants, The First National Bank of Hawarden, Charles R. Allen, and The Bank of Alcester, at the time of receiving said note and said stock of merchandise at Alcester, S. D., had knowledge of the object and intent with which the same was given to them, and received the same in order to assist and enable the said bankrupt to carry out the fraudulent purpose aforesaid.

And your orator further alleges upon information and belief that at the time said note was given and the alleged sale of the stock of merchandise made to the defendants, as aforesaid, the said Walker was largely indebted on past-due claims and was acting in contemplation of insolvency, and that said transfers were made and

received with intent to hinder, delay, impede, and defraud his creditors, and with a view to prevent said property from being applied in the payment of his debts, and with the further intent to cover up his property so that his creditors should not be able to reach the same.

And your orator further shows upon information and belief that the said pretended sale of the said stock of clothing and merchandise in the village of Alcester and State of South Dakota, by the said bankrupt to the said Charles R. Allen was in contemplation of bankruptcy and was fraudulent and void, and that the said Allen was not the real purchaser of said stock of clothing and merchandise, but that the said pretended purchase by the said Allen was for the use and benefit of the said First National Bank of Hawarden, Iowa, and the Bank of Alcester, of Alcester, South Dakota, and that the said First National Bank of Hawarden, Iowa, was the real purchaser of said stock of clothing and merchandise, and that the sale thereof to the First National Bank of Hawarden, Iowa, was for the purpose of creating a preference in favor of the said First National Bank of Hawarden, Iowa, and the Bank of Alcester, South Dakota, of the indebtedness of the said Walker to the said defendants, as aforesaid.

And your orator further alleges that Frederick E. Watkins is president of said First National Bank of Hawarden, Iowa, and is the managing partner of said copartnership known as the Bank of Alcester, of Alcester, South Dakota, and was such officer and such managing partner during the times and in all the transactions referred to herein.

And your orator further shows and alleges that by the provisions of the act of Congress approved July 1, 1898, to establish a uniform system of bankruptcy, your orator became, by operation of law, entitled as such trustee to the possession of all the property of the said Frank T. Walker, bankrupt, and to all property conveyed by him to said First National Bank and Charles R. Allen, defendants, in fraud of his creditors as aforesaid, and entitled to sue for and recover the same as assets of said bankrupt; and forasmuch as your orator can have no adequate relief except in this court, sitting as a court of bankruptcy, and to the end, therefore, that the said defendants may, if they can, show cause why your orator should not have the relief hereby prayed, and may, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make (but not under oath, the same being expressly waived) to the premises, and to all the separate matters hereinbefore stated and charged, as full and particularly as if the same were repeated and interrogated as to each of said matters, and that the said note and the conveyance of said stock of merchandise be declared fraudulent and void, and that the same may be decreed to be invalid against the complainant as trustee aforesaid, and that the same may be set aside, and that the said defendants and each of them may be compelled to account for the said property and the profits thereof so fraudulently conveyed, as aforesaid, and any

moneys received by virtue of said conveyances or note, and that the said defendants, their agents and servants, be restrained
6 and enjoined from disposing of or in anywise transferring said property, or of any money received thereunder, and from mixing and commingling said property with their own, under penalties to be pronounced by the court, and that your orator may recover the costs of this proceeding and have such other and further relief as may seem just and proper, may it please your honor to grant unto your orator the writ of subpœna, issued out of and under the seal of this court, directed to said defendants and each of them, commanding them, on a day certain therein to be named and under a certain penalty, to appear in this honorable court, then and there to answer all and singular the premises, and to stand and perform and abide such further order, direction, and decree as may be made against them or either of them.

And your orator will ever pray.

FRED BARDES,
Trustee, Complainant.
LOHR, GARDINER & LOHR,
Solicitors for Complainant.

H. C. GARDINER, *Of Counsel.*

STATE OF IOWA, }
Woodbury County, } *ss:*

On this 27th day of April, 1899, before me personally appeared Fred Bardes and made oath that he has read the foregoing bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated to be based upon information and belief, and that as to those matters he believes them to be true.

FRED BARDES.

Subscribed and sworn to before me this 27th day of April, 1899.

F. W. LOHR,
[SEAL.] *Notary Public in and for Woodbury County, Iowa.*

Filed April 28, 1899.

A. J. VANDUZEE, *Clerk,*
By J. H. BOLTON, *Deputy.*

7 In the District Court of the United States in and for the Northern District of Iowa, Western Division.

In the Matter of the Estate of FRANK T. WALKER, Bankrupt.

FRED BARDES, Trustee, Complainant;
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA; The Bank of Alcester, of Alcester, South Dakota, and Charles R. Allen, Defendants. } In Bankruptcy.

Demurrer of the Above-named Defendants to the Bill of the Above-named Complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and for- as the same are therein set forth and alleged, doth demur to said bill, and for causes of demurrer showeth:

1st. That it doth appear by the complainant's own showing by said bill that he is not entitled to the relief demanded in said bill against these defendants.

2nd. It appears from said bill that this court is without jurisdiction for the reason that the controversy is between citizens of the same State.

Wherefore, and for divers other good causes of demurrer appearing on said bill, defendants doth demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make answer to said bill, and they humbly pray to be hence dismissed with their reasonable costs therein sustained.

WM. MILCHRIST,
Solicitor & of Counsel for Defendants.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in the point of law.

WM. MILCHRIST,
Of Counsel for Defendants.

STATE OF IOWA, *Woodbury County,* } *ss:*

William Milchrist, being duly sworn, deposes and says: I am the attorney for the above-named defendants. The foregoing demurrer is not interposed for delay.

WM. MILCHRIST.

Subscribed in my presence and sworn to before me by the said William Milchrist this 10th day of June, A. D. 1899.

CORA G. WHEELOCK,
[SEAL.] *Notary Public in & for Woodbury County, State of Iowa.*

Filed June 12th, 1899.

A. J. VANDUZEE, *Clerk.*

8 UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Vanduzee, clerk of the United States district court in and for the northern district of Iowa, do hereby certify that the foregoing transcript contains the full, true, and complete copies of the bill of complaint and the demurrer in the case of Fred Bardes, trustee of estate of Frank T. Walker, bankrupt, against First National Bank of Hawarden, Iowa, *et al.*, as full, true, and complete as the original of the same now remains on file and of record in my office, and that attached hereto is the original certificate of O. P. Shiras, judge of the district court of United States in and for said district, certifying to the Supreme Court of the United States for its consideration certain questions arising in said suit.

In witness whereof I hereunto subscribe my name and affix the seal of said U. S. district court, at my office, in Dubuque, in said northern district of Iowa, this 14th day of October, A. D. 1899.

[Seal District Court U. S., Northern District of Iowa.]

A. J. VAN DUZEE,
Clerk U. S. District Court, Northern District of Iowa.

Transcript, 46 fo.	4.60
Certificate & seal	35
	$4.95

Endorsed on cover: File No., 17,543. N. Iowa D. C. U. S. Term No., 429. Fred Bardes, trustee of the estate of Frank T. Walker, bankrupt, complainant, *vs.* The First National Bank of Hawarden, Iowa, *et al.* Filed October 21, 1899.

9 In the United States District Court in & for Northern District of Iowa, Western Division.

FRED BARDES, Trustee of the Estate of Frank T. Walker, Bankrupt,
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA, ET AL.

Be it remembered that heretofore, on the 4th day of January, A. D. 1900, the same being one of the regular days of the regular October term, 1899, of the United States district court for the northern district of Iowa, western division, the following proceedings were had in the above-entitled cause, the Honorable O. P. Shiras, judge of said district, presiding, as appears of record on page — of Record — of said court, to wit:

FRED BARDES, Trustee of the Estate of Frank T. Walker, Bankrupt,
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA, ET AL. } Equity.

This cause coming up this 4th day of January, 1900, upon the demurrer interposed on behalf of defendants to the petition questioning the jurisdiction of the court in the case, and the court, being advised in the premises, sustains the demurrer, holding that upon the face of the pleadings and the record it appears that the court is without jurisdiction to entertain and decide the case; and thereupon—

It is ordered and decreed that the bill be dismissed for want of jurisdiction, but without prejudice to complainant's right to institute proceedings in a court having jurisdiction; to which ruling and order of dismissal the complainant at the time duly excepted, and prayed the court to certify the question of its jurisdic-
10 tion in the premises to the Supreme Court of the United States for its decision thereon.

I, A. J. Van Duzee, clerk of United States district court in and for the northern district of Iowa, do hereby certify that the foregoing transcript contains a full, true, and complete copy of the judgment of the court entered in the proceedings entitled "Fred Bardes, trustee of estate of Frank T. Walker, bankrupt, *vs.* First National Bank of Hawarden, Iowa, *et al.*," as full, true, and complete as the original of said order remains of record in my office in the western division of the northern district of Iowa.

Seal District Court U. S., Northern District of Iowa.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, this 4th day of January, A. D. 1900.

A. J. VAN DUZEE,
Clerk U. S. District Court in and for Northern District of Iowa.

11 In United States District Court, Northern District of Iowa, Western Division.

FRED BARDES, Trustee of Estate of Frank T. Walker, Bankrupt,
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA, ET AL.

The complainant in the above-entitled case, Fred Bardes, trustee of the estate of Frank T. Walker, bankrupt, deeming himself aggrieved by the order and judgment of the court rendered January 4th, 1900, dismissing the case for want of jurisdiction, does hereby appeal from such order and judgment to the Supreme Court of the United States, filing herewith an assignment of errors, and he prays that this appeal may be allowed and that a transcript of the record

and proceedings may be duly certified to the Supreme Court, at Washington, D. C.

FRED BARDES,
Trustee of Frank T. Walker Estate, in Bankruptcy,
By SHULL & FARNSWORTH, *Solicitors.*

Appeal allowed.
O. P. SHIRAS, *Judge.*

Filed January 12th, 1900.

A. J. VAN DUZEE, *Clerk.*

12 In United States District Court in & for Northern District of Iowa, Western Division.

FRED BARDES, Trustee of Estate of Frank T. Walker, Bankrupt, }
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA, ET AL. }

Assignment of Errors.

Now comes Fred Bardes, trustee of estate of Frank T. Walker, bankrupt, complainant in above case, and assigns the following errors in the order and decree of the court in said case:

1. The court erred in holding that it was without jurisdiction to hear and determine the said case and the controversy therein presented.

2. The court erred in holding that under the provisions of the act of Congress known as the bankrupt act the district court of the United States have not jurisdiction over all suits brought by trustees in bankruptcy to recover the property or assets of the estate without regard to the amount involved or the citizenship of the parties to the suit, but that the jurisdiction of the district courts is limited by the provisions of the second clause of section 23 of the bankrupt act.

3. The court erred in dismissing this case on the ground that the court could not take jurisdiction thereof.

Wherefore the appellant prays that the ruling, order, and decree appealed from may be reversed and set aside.

FRED BARDES,
Trustee of Estate of Frank T. Walker, Bankrupt,
By SHULL & FARNSWORTH, *Sol.*

Filed January 12, 1900.

A. J. VAN DUZEE, *Clerk.*

13 In the United States District Court in & for Northern District of Iowa, Western Division.

FRED BARDES, Trustee of Estate of Frank T. Walker, Bankrupt,
vs.
FIRST NATIONAL BANK OF HAWARDEN, IOWA, ET AL. } Equity.

Be it remembered that this case coming before the court upon a demurrer to the bill questioning the jurisdiction of this court to entertain the case or decide the controversy set forth in the bill filed, and the court, upon consideration of the demurrer, having held that the court was without jurisdiction in the case and having entered an order dismissing the case for want of jurisdiction, but being desirous of obtaining the judgment of the Supreme Court of the United States upon the questions involved, to the end that justice should be done between the parties hereto, this court now certifies to the Supreme Court for its decision the question of the jurisdiction of this court over the case and controversy, and, to the end that this court may be fully advised in the premises, this court certifies to and asks the judgment of the Supreme Court upon the following questions:

1st. Do the provisions of the second clause of section 23 of the act of Congress known as the bankrupt act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties or to set aside transfers of property to third parties alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors?

14 2nd. Can the district court of the United States under any circumstances entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of proceedings in bankruptcy?

3rd. Can this court, being the district court for the northern district of Iowa, take jurisdiction over the suit as it now stands on record?

4th. If the complainant should dismiss the suit as to the defendants living in Iowa, thus making it a suit between citizens of Iowa, on the one hand, and citizens of South Dakota, on the other, and involving over $2,000, exclusive of interest and costs, would jurisdiction exist in this court?

O. P. SHIRAS,
District Judge for Northern District of Iowa.

15 In the United States District Court in & for Northern District — Iowa.

I, A. J. Van Duzee, clerk of the United States district court in and for the northern district of Iowa, do hereby certify that the foregoing transcript contains a full, true, and complete copy of the

bill of complaint, the demurrer, the judgment of the court of January 4th, 1900, dismissing the bill of complaint, prayer for appeal, and assignment of errors in the case of Fred Bardes, trustee of estate of Frank T. Walker, bankrupt, against First National Bank of Hawarden, Iowa, *et al.*, as full, true, and complete as the original of the same now remains on file and of record in my office, and that attached hereto is the original certificate of O. P. Shiras, judge of the district court of the United States in and for said district, certifying to the Supreme Court of the United States for its consideration certain questions arising in said suit.

Seal District Court U. S., Northern District of Iowa.

In witness whereof I hereunto subscribe my name and affix the seal of said U. S. district court, at my office in Dubuque, in said northern district of Iowa, this 12th day of January, A. D. 1900.

A. J. VAN DUZEE,

Clerk United States District Court, Northern District of Iowa.

[Ten-cent U. S. internal-revenue stamp, canceled Jan. 12, 1900. A. J. V.]

Endorsed on cover: File No., 17,617. N. Iowa D. C. U. S. Term No., 503. Fred Bardes, trustee of the estate of Frank T. Walker, bankrupt, appellant, *vs.* The 1st National Bank of Hawarden, Iowa, *et al.* Filed January 22nd, 1900.

[redacted]

12054

(17,330.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 745.

S. DUFFIELD MITCHELL, RECEIVER IN BANKRUPTCY OF JOSEPH McD. SCOTT, DOING BUSINESS AS J. McD. SCOTT & COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN C. McCLURE AND W. REED & COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 1, 1899.

In the District Court of the United States for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of Joseph McD. Scott, Doing Business as J. McD. Scott & Co., *vs.* JOHN C. MCCLURE and W. REED & Co. } No. 10, May Term, 1899. Assignee's Docket.

Among the rolls, records, and judicial proceedings in the district court of the United States for the western district of Pennsylvania, at No. 10, May term, 1899, may be found the following words and figures, to wit:

Docket Entries.

On præcipe filed Jan'y 11, 1899, writ of replevin issued, returnable Feb'y 6, 1899. Jan'y 20, 1899, on motion to abate said writ filed, rule granted on plaintiff to show cause why said writ should not be abated, returnable the 20th inst. Jan'y 28, 1899, answer of S. D. Mitchell to said rule filed. Jan'y 28th, 1899, argument on motion to abate writ and answer, *C. A. V.* Feb'y 4, 1895, opinion of court and order granting said motion filed. Same day, bill of exceptions to said order filed. Feb'y 14, 1899, order made substituting S. Duffield Mitchell trustee, etc., in place of S. Duffield Mitchell, receiver, as plaintiff. Same day, appeal to United States circuit court of appeals for third circuit filed and allowed. Same day, assignments of error filed. Feb'y 16, 1899, writ of replevin returned, showing marshal's return thereon, and filed. Feb'y 18, 1899, application for writ of error to Supreme Court of the United States filed. March 4, 1899, leave granted and order made that said appeal to the circuit court of appeals be discontinued and withdrawn. March 6, 1899, certificate of judge that the sole question at issue was the question of jurisdiction of this court to en-
2 tertain this action filed. March 8, 1899, on petition for writ of error to the Supreme Court of the United States filed, writ of error allowed. March 11, said writ and citation issued. Same day, copy of citation, with acceptance of service by counsel for defendants, filed.

Appearances: For plaintiff, Thomas Patterson, S. Duffield Mitchell; for defendants, John S. Ferguson.

3 In the District Court of the United States for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of Joseph McD. Scott, Doing Business as J. McD. Scott & Co., *vs.* JOHN MCCLURE and W. REED & COMPANY. } No. 10, May Term, 1899.

To William T. Lindsey, Esq., clerk of said court.

SIR: Issue summons in replevin against the above-named defendants, who are residents of Allegheny county, Pennsylvania, and

citizens of the State of Pennsylvania, to answer the plaintiff whereof they took the following-described property:

12 large boxes containing mirro-s, mantels, and sideboards; three crates containing laundry tubs; 14 small boxes containing marble bath tub, fixtures, etc.; one large hogshead containing foot-bath tub, one small hogshead containing bath-tub and plumbing fixtures, one large crate containing large bath tub, two barrels containing sundry fixtures, and two barrels containing tiling; all of which property is deposited in the name of the defendant John McClure in the storage warehouse of the above-named defendant, W. Reed & Company, situate at McKeesport, Allegheny county, Pennsylvania, and being of the value of two thousand five hundred ($2,500.00) dollars, and holds the same against pledges, etc.; returnable *sec. led.*

THOMAS PATTERSON,
S. D. MITCHELL,
Attorney- for Plaintiff.

Endorsements: No. 10, May term, 1899. S. D. Mitchell, receiver, *vs.* John McClure and W. Reed & Co. Præcipe for replevin. Filed Jan'y 11, 1899.

4 In the District Court of the United States for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of Joseph McD. Scott, Doing Business as J. McD. Scott & Co.,
vs.
JOHN MCCLURE and W. REED & COMPANY.
} No. 10, May Term, 1899.

The President of the United States to the marshal of the district court of the United States for the western district of Pennsylvania, Greeting:

If S. Duffield Mitchell, receiver in bankruptcy of Joseph McD. Scott, formerly doing business as J. McD. Scott & Co., make you secure of prosecuting his claim with effect against John McClure and W. Reed & Company, defendants above named, who are residents of Allegheny county, Pennsylvania, and citizens of the State of Pennsylvania, late of your district, then we command you that, justly and without delay, you cause to be replevied and delivered to the said S. Duffield Mitchell, receiver in bankruptcy of Joseph McD. Scott, formerly doing business as J. McD. Scott & Co., the following personal property, to wit:

12 large boxes containing mirrors, mantels, and sideboards; three crates containing laundry tubs; 14 small boxes containing marble bath-tub, fixtures, etc.; one large hogshead containing foot-bath tub; one small hogshead containing bath-tub and plumbing fixtures; one large crate containing large bath-tub; two barrels containing sundry fixtures, and two barrels containing tiling, all of which property is deposited in the name of the defendant John McClure in the storage warehouse of the above-named defendant,

W. Reed & Company, situate at McKeesport, Aliegheny county, Pennsylvania, and being of the value of two thousand five hundred ($2,500.00) dollars.

which the said John McClure and W. Reed & Company took and unjustly detains, as it is said, etc., and that you put, by sureties and safe pledges, the said John McClure and W. Reed & Company so that they be and appear before our judge at the city of Pitts-
5 burgh, at the United States district court for the western district of Pennsylvania, to be there held, on the first Monday of February, A. D. 1899, to answer the said S. Duffield Mitchell, receiver in bankruptcy of Joseph McD. Scott, formerly doing business as J. McD. Scott & Co., of a plea whereof he took the goods and chattels aforesaid, the property of the said S. Duffield Mitchell, receiver in bankruptcy of Joseph McD. Scott, formerly doing business as J. McD. Scott & Co., and the same unjustly detains against sureties and safe pledges; and have you then and there this writ.

Witness the Honorable Joseph Buffington, judge of the district court of the United States for the western district of Pennsylvania, this eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

WM. T. LINDSEY, *Clerk.*

Endorsements: No. 10, May term, 1899. S. D. Mitchell, receiver, *vs.* John McClure and W. Reed & Co. Writ in replevin. Filed Feb'y 16th, 1899. Replevied as within commanded and property herein described delivered to plaintiff Jan'y 12th, 1899. So ans. Fred. C. Leonard, U. S. marshal, per J. W. Snyder, deputy.

Service	$2.00
Mileage.....	.90
	$2.90

6 In the District Court of the United States, Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of J. McDonald Scott, Doing Business as J. McD. Scott and Company, *vs.* JOHN MCCLURE and REED AND COMPANY.	No. 10, May Term, 1899.

And now, Jan'y 20th, 1899, rule to show cause granted, ret. 28th January, 1899.

BY THE COURT.

Endorsements: No. 10, May term, 1899. In the district court of the United States for the western district of Pennsylvania. S. Duffield Mitchell, receiver, etc., *vs.* John McClure *et al.* Motion to abate the writ. Reasons and rule to show cause thereon. Filed January 20, 1899.

7 In the District Court of the United States for the Western District of Pennsylvania.

S. D. MITCHELL, Receiver in Bankruptcy of J. McD. Scott, Doing Business as J. McD. Scott & Co.,
vs.
JOHN MCCLURE ET AL.
No. 10, May Term, 1899.

To the Honorable Joseph Buffington, judge of said court:

The answer of S. Duffield Mitchell, receiver above named, respectfully sets forth:

That he took the goods in above-entitled case upon the claim that the same had been conveyed to the said defendant without consideration and in fraud of the bankrupt act and the rights of the creditors of said bankrupt, and that no title thereto passed to said defendant as against the receiver by reason of the premises.

That he believes and expects to be able to prove at the trial of the above-entitled case the truth of the allegations aforesaid.

That your respondent is informed and advised that the title of the said plaintiff is one peculiarly cognizable under the bankrupt act, and that the construction of the said act and the adjudication of said controversy arising as to the property is within the jurisdiction of this court, and not a matter of which the courts of the Commonwealth of Pennsylvania have or can have any cognizance or jurisdiction whatever.

In all of which the respondent respectfully submits himself to the order of this court.

S. D. MITCHELL, *Receiver*,
By THOS. PATTERSON, *Attorney*.

8 ALLEGHENY COUNTY, *ss:*

Before me personally appears S. D. Mitchell, who, being duly sworn, declares and says that the matters set forth in the foregoing answer are true and correct, to the best of his knowledge and belief.

S. D. MITCHELL.

Subscribed and sworn before me this 28th Jan., 1899.
WM. T. LINDSEY, *Clerk*.

Endorsements: No. 10, May T., 1899. S. D. Mitchell, receiver, *vs.* John McClure *et al.* Answer to rule to abate writs. Filed January 28th, 1899.

9 In the District Court of the United States for the Western District of Pennsylvania.

S. D. MITCHELL, Receiver in Bankruptcy, *vs.* JOHN MCCLURE ET AL. } No. 10, May Term, 1899.

Surmotion to abate writ of replevin.

BUFFINGTON, *J.:*

A petition in bankruptcy having been filed in this court against one J. McD. Scott, Mr. S. D. Mitchell was appointed receiver. Thereafter said Mitchell as receiver brought the present action of replevin in the district court against John McClure and others to recover certain personal property. All parties are citizens of Pennsylvania. The defendants move to abate the writ on the ground of lack of jurisdiction by district court. The motion involves the right of the plaintiff as receiver or as trustee (for he has since been so made and could be substituted as such) in a proceeding in bankruptcy to maintain in the district court an action of replevin for alleged property of the bankrupt held adversely under claim of title. What the jurisdiction of the district court sitting as a court of bankruptcy may be in other forms of procedure or what its power to reclaim or otherwise take possession of a bankrupt's power are questions now now before us. The present one is as to the jurisdiction of the district court to entertain a plenary common-law action.

While such question as affected by the present law is new, light is thrown upon it by the views announced by the Supreme Court of the United States on analagous jurisdictional questions under the act of 1867. In conferring jurisdiction on the district court that act provided: "The jurisdiction hereby conferred shall extend
10 * * * to the collection of all assets of the bankrupts."

In Morgan *vs.* Thornhill, 11 Wallace, 75, the right of appeal depended on what particular statutory provision vested jurisdiction. The third clause of section second of the act provided:

"Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to or vested in such assignee."

After a careful discussion of the act it was held that the district court's jurisdiction in a plenary suit was based not on the provision extending jurisdiction "to the collection of all the assets of the bankrupts," but to the clause above quoted. In reaching such conclusion, speaking of the prior clauses which conferred a supervisory jurisdiction — the circuit court in cases and questions arising under the act, the court said:

"Apart from those two provisions, the third clause of the section provides that circuit courts shall also have concurrent jurisdiction

with the district courts of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against such assignee touching any property or rights of property of such bankrupt transferrable to or vested in such assignee."

Controversies, in order that they may be cognizable under that clause of the section, either in the circuit or district court, must have respect to some property or rights of property of the bankrupt transferrable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the
11 two parties described in that clause and against the other. All three of those conditions must concur to give the jurisdiction; but where they all concur the party suing may, at his election, commence his suit either in the circuit or district court, and if in the latter it is clear that the case, when it has proceeded to final judgment or decree, may be removed into the circuit court for re-examination by writ of error if it was an action at law, or by appeal if it was a suit in equity, provided the debt or damage claimed amounts to more than five hundred dollars and the writ of error is seasonably sued out and the plaintiff in error complies "with the statu-s regulating the granting of such suits," or the appeal is claimed and the required notices are given within ten days from the judgment or decree. * * * Independent of the bankrupt act, the district courts possess no equity jurisdiction whatever, as the previous legislation of Congress conferred no such authority upon those courts since the prior bankrupt act was repealed. Whatever jurisdiction, therefore, they possess in that behalf is wholly derived from the bankrupt act now in force.

Undoubtedly the jurisdiction conferred by the third clause of the second section is of the same character as that conferred upon the circuit courts by the eleventh section of the judiciary act, and it follows that final judgments in civil actions and final decree in suits in equity rendered such cases, where the sum or value exceeds two thousand dollars, exclusive of costs, may be re-examined in this court when properly removed by writ of error or appeal, as required by existing laws.

Concurrent jurisdiction with the district courts of all suits at law or in equity are the words of that clause, *showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in the judiciary act and the third article of the Constitution.*"

12 This construction was followed in Smith *vs.* Mason, 14 Wallace, 430; was recognized in Marshall *vs.* Knox, 16 Wallace, 556, and is of authoritative force today. Presumably with knowledge of these decisions, the present act was passed by Congress. That act invested district courts "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms as they are now and may hereafter be held, to * * * cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

The language thus employed, "cause the estates of bankrupts to be collected," is not broader, if indeed as broad, as that in the former act, for it may be said that a jurisdiction extended "to the collection of assets" implies a grant of power to the authorized court to itself enforce such collection, while a grant of power "to cause such estates to be collected" necessarily carries with it no such implication. But, assuming they are substantially the same, why should the words of the latter act be given a construction which corresponding ones did not have under the former? The absence, too, in the new act of a jurisdictional grant of power to bring plenary suits corresponding to the third clause of section two of the former act, quoted above, is also suggestive of a purpose in Congress not to grant such power. But this is not all. In the twenty-third section of the present act we find a much narrower grant of Federal jurisdiction, and that to the circuit court alone. That section, which by its caption refers to the "jurisdiction of United States and State courts," by subdivision (*a*) limits the jurisdiction of the circuit court between trustees as such and adverse claimants concerning property acquired or claimed by trustees to cases where such court
13 would have had jurisdiction had such controversy been between the bankrupt and such adverse claimants and no proceedings in bankruptcy been instituted. Section (*b*) expressly restricts suits brought by a trustee to a court where a bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted. To that extent it limits jurisdiction in both circuit and district courts. Such restrictions of Federal jurisdiction as compared with the broad jurisdictional provisions of the former act and the further positive requirement that suits by the trustee shall be brought in courts where the bankrupt could have done so evidence the intent of Congress that other courts beside the circuit and district ones could and in some cases must be reserted to in causing the estates of bankrupts to be collected. To attribute to that part of section 2, viz., "cause the estates of bankrupts to be collected," etc., the sweeping effect here claimed, viz., to authorize the district court to entertain jurisdiction of a plenary, common law action, is to ignore the limiting provisions of section 23, which by its caption refers to the "jurisdiction of United States and State courts."

To say that our construction of the act shears the district court of its power to administer the bankrupt law, even if it were true, is no reason to construe it otherwise. The remedy for such an evil, if it exists, is to be sought from Congress and not in strained judicial construction.

The action is for the possession of personal property. On the face of the pleadings no reason appears why the bankrupt could not have brought replevin in the common pleas of Pennsylvania. If such be the case, clause *b* of sec. 23 provides that where suit is brought the bankrupt's trustee should resort to that court. It is contended, however, that this section does not apply to the
14 present action, because the bankrupt, having conveyed these goods in fraud of his creditors, had no standing to question

the defendant's title; that the right of action vested in the bankrupt's receiver or trustee never was in the bankrupt, and consequently clause *b* has no application. Possibly sufficient answer to this contention is that such a defense goes to defeat the action and not to affect jurisdiction. But, assuming this section does not apply, the plaintiff must still show that the district court is by the act elsewhere vested with jurisdiction in this plenary, independent action of replevin.

After matured consideration we have reached the conclusion that the act does not grant such jurisdiction, either by express words or by necessary implication, and the motion to abate is therefore granted.

Endorsements: No. 10, May term, 1899. United States district court, western district of Pennsylvania. S. D. Mitchell, receiver, *vs.* John McClure *et al.* Opinion of Buffington, J. Filed Febr'y 4, 1899.

15 In the District Court of the United States for the Western District of Pennsylvania.

S. D. MITCHELL, Receiver in Bankruptcy,
vs.
JOHN MCCLURE ET AL. } No. 10, May Term, 1899.

And now, to wit, February 4th, 1899, the notice to abate the replevin writ in the above-stated case having been argued, the court, upon consideration thereof, orders and directs that the said writ of replevin shall be abated for the reasons set forth in the opinion filed herewith.

BY THE COURT.

Endorsements: No. 10, May term, 1899. S. D. Mitchell, receiver, *vs.* John McClure *et al.* Decree of court granting motion to abate writ of replevin. Filed Feb'y 4, 1899.

16 In the District Court of the United States for the Western District of Pennsylvania.

S. D. MITCHELL, Receiver, etc.,
vs.
MCCLURE ET AL. } No. 10, May Term, 1899.

And now, viz., Feb'y 4th, 1899, comes the above-named plaintiff and excepts to the order of the court abating the writ of replevin in above-entitled case this day entered.

JOS. BUFFINGTON, *Judge.*

Endorsements: No. 10, May term, 1899. S. D. Mitchell, receiver, etc., *vs.* McClure *et al.* Bill of exceptions to order abating writ. Filed Feb'y 4, 1899.

17 In the District Court of the United States for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of Joseph McD. Scott, Doing Business as J. McD. Scott & Co., *vs.* JOHN MCCLURE and W. REED & COMPANY. } No. 10, May Term, 1899.

And now, to wit, February 14th, A. D. 1899, comes Thomas Patterson, Esq., counsel for the above-named plaintiff, and moves the court to substitute S. Duffield Mitchell, trustee of Joseph McD. Scott, formerly doing business as J. McD. Scott & Co., in place of S. Duffield Mitchell, receiver, etc., he having been appointed said trustee on January 11th, 1899, and having accepted the duties of said office, and having filed his bond, as required by law, on January 21st, 1899, which was duly approved, as will appear by the records in this court at No. 94, in bankruptcy.

BY THE COURT.

I have no objec-ion to the above order being made.

JOHN S. FERGUSON,
Attorney for McClure et al.

Endorsements: No. 10, May term, 1899. S. Duffield Mitchell, receiver, *vs.* John McClure *et al.* Motion to substitute plaintiff as trustee. Filed Feb'y 14, 1899.

18 In the District Court of the United States for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Trustee in Bankrupty of Joseph McD. Scott, Doing Business as J. Mc. D. Scott & Co., *vs.* JOHN MCCLURE and W. REED & COMPANY. } No. 10, May Term, 1889.

S. Duffield Mitchell, the above-named plaintiff, deeming himself aggrieved by the decree made and entered in the above-entitled cause on the 4th day of February, A. D. 1899, petitions the said district court to grant a writ of error to the Supreme Court of the United States in above-stated cause for the reasons specified in the assignments of errors filed herewith, and he prays that such writ of error may be allowed, and that a transcript of the record of the proceedings and papers upon said order so made, duly authenticated, may be sent to the Supreme Court of the United States.

S. DUFFIELD MITCHELL,
Trustee, Appellant.

Endorsements: No. 10, May term, 1899. S. Duffield Mitchell, trustee, etc., *vs.* John McClure *et al.* Petition for writ of error. Filed March 8, 1899.

And now, March 8th, 1899, the within writ of error is allowed as prayed for.

JOS. BUFFINGTON, *Judge.*

19 In the District Court of the United States for the Western District of Pennsylvania.

S. D. MITCHELL, Receiver in Bankruptcy,
vs.
JOHN MCCLURE ET AL. } No. 10, May Term, 1899.

And now, February 14th, 1899, the plaintiff in the above-stated case, by Thomas Patterson, Esq., his attorney, comes into court and files the following assignments of error, to wit, viz:

First. The learned district court erred in making the following decree: "And now, to wit, February 4th, 1899, the motion to abate the replevin writ in the above-stated case having been argued, the court upon consideration thereof orders and directs that the said writ of replevin shall be abated for the reasons set forth in the opinion filed herewith."

Second. The learned district court erred in not dismissing the motion made by the above-named defendants to abate the writ of replevin in the above-stated case.

THOS. PATTERSON,
Att'y for Plaintiff in Error.

Endorsements: Pittsburgh, Pa., February 14th, 1899. No. 10, May term, 1899. S. D. Mitchell, receiver, *vs.* John McClure *et al.* Assignments of error. Filed Feb'y 14, 1899.

20 In the District Court of the United States for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Trustee in Bankruptcy of Joseph McD. Scott, Doing Business as J. McC. Scott & Co., Bankrupt,
vs.
JOHN MCCLURE and W. REED & Co. } No. 10, May Term, 1899.

Certificate.

And now, to wit, March 6, A. D. 1899, I, Joseph Buffington, judge of the district court of the United States for the western district of Pennsylvania, do hereby certify that in the above-stated case the sole question in issue was the jurisdiction of this court to entertain the above-named action of replevin; which question arose upon the following statements of facts, viz:

The plaintiff, S. Duffield Mitchell, a citizen of the State of Pennsylvania, trustee in bankruptcy of Joseph McD. Scott, formerly doing business as J. McD. Scott & Co., bankrupt, duly appointed such trustee in bankruptcy by this court, at No. 94, in bankruptcy, herein, brought an action of replevin against the defendants, John McClure and W. Reed & Co., residents of Allegheny county, within this jurisdictional district and citizens of the State of Pennsylvania, to recover the possession of personalty, stated in said writ to be of the value of two thousand five hundred ($2,500.00) dollars, alleged to be the property of the plaintiff.

The United States marshal for this district executed the writ and delivered the property to the plaintiff.

The defendant John McClure subsequently obtained a rule to show cause why said writ of replevin should not be abated and restitution of said property to the defendant be ordered on the ground that this court had no jurisdiction to entertain such motion.

21 To this rule the plaintiff made answer—*pro ut* record—that he took the goods upon the claim that the same had been conveyed to the defendants without consideration and in fraud of the bankruptcy act and the rights of the creditors of said bankrupt, and that no title thereto had passed to said defendant as against the plaintiff by reason of the premises; that the title of the plaintiff is one peculiarly cognizable under the bankrupt act, and that the construction of the said act and the adjudication of said controversy arising as to the property is within the jurisdiction of this court and not a matter of which the courts of Pennsylvania have or can have any cognizance or jurisdiction whatever.

Upon argument thereof by counsel for the respective parties and after consideration thereof, this court ordered that the said suit of replevin be abated for the reason that under the bankruptcy act of July 1st, 1898, jurisdiction to entertain such a suit is not conferred upon this court, and the views of this court upon such question were embodied in an opinion now on file among the records of the above-stated case.

To this the plaintiff excepted, and this court thereupon sealed for him a bill of exceptions.

In testimony whereof I have hereunto set my hand and seal the day and year aforesaid.

JOS. BUFFINGTON, [SEAL.]
District Judge.

Endorsements: No. 10, May term, 1899. S. D. Mitchell, receiver, *vs.* John McClure *et al.* Certificate of judge. Filed March 6, 1899.

22 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States district court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between S. Duffield Mitchell and John McClure and W. Reed & Company, a manifest error hath happened, to the great damage of the said S. Duffield Mitchell, receiver, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 7th day of April next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Joseph Buffington, judge of the district court of the United States for the western district of Pennsylvania, this 11th day of March, A. D. 1899.

[Seal of U. S. District Court, W. D. Pennsylvania.]

[SEAL.] WM. T. LINDSEY, *Clerk.*

Allowed by—
JOS. BUFFINGTON,
District Judge.

Filed.

23 *Citation.*

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *sct:*

To John C. McClure and W. Reed & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 7th day of April next, pursuant to a writ of error filed in the clerk's office of the United States district court for the western district of Pennsylvania, wherein S. Duffield Mitchell, receiver in bankruptcy of Joseph McD. Scott, doing business as J. McD. Scott & Co., is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said

appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this eleventh day of March, A. D. 1899, at the city of Pittsburgh, in said western district of Pennsylvania.

JOS. BUFFINGTON,
United States District Judge.

Attest: WM. T. LINDSEY, *Clerk.*

March 11, 1899.
Service accepted by—
JOHN S. FERGUSON,
Att'y for John McClure and W. Reed & Co.

24 In the District Court of the United States for the Western District of Pennsylvania.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of Joseph McD. Scott, Doing Business as J. McD. Scott & Co.,	No. 10, May Term, 1899.
vs.	
JOHN MCCLURE and W. REED & COMPANY.	

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William T. Lindsey, clerk of the district court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

Seal of U. S. District Court, W. D. Pennsylvania.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 11th day of March, A. D. 1899.

WM. T. LINDSEY, *Clerk.*

[Endorsed:] No. 10, May term, 1899. District court of the United States, western district of Pennsylvania. S. Duffield Mitchell, receiver, etc., *vs.* John McClure and W. Reed & Company. Exemplification of the record.

Endorsed on cover: File No., 17,330. W. Pennsylvania D. C' U. S. Term No., 745. S. Duffield Mitchell, receiver in bankruptcy of Joseph McD. Scott, doing business as J. McD. Scott & Company, plaintiff in error, *vs.* John C. McClure & W. Reed & Company. Filed March 18, 1899.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 512.

W. A. HICKS, TRUSTEE IN BANKRUPTCY OF ALBERT KNOST AND ARNOLD WILHELMY, PARTNERS AS KNOST & WILHELMY, APPELLANT,

vs.

BERTHA KNOST.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JANUARY 31, 1900.

(17,626.)

(17,626.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 512.

W. A. HICKS, TRUSTEE IN BANKRUPTCY OF ALBERT KNOST AND ARNOLD WILHELMY, PARTNERS AS KNOST & WILHELMY, APPELLANT,

vs.

BERTHA KNOST.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 3, 1900.

1 United States Circuit Court of Appeals, Sixth Circuit.

W. A. HICKS, Trustee in Bankruptcy of Albert Knost and Arnold Wilhelmy, Partners as Knost & Wilhelmy, Appellant,
v.
BERTHA KNOST, Appellee.
No. 736. Certificate.

On March 22, 1899, Albert Knost and Arnold Wilhelmy, partners as Knost & Wilhelmy, were by the district court of the United States for the southern district of Ohio, sitting in bankruptcy, adjudged bankrupts, and W. A. Hicks was appointed trustee of said bankrupts, on the 13th of April, 1899, and duly qualified as such. Thereafter, upon May 4, 1899, Hicks, as such trustee, filed a bill in equity in the said district court against Bertha Knost, in which, after duly setting forth the adjudication of bankruptcy aforesaid and his appointment and qualification as trustee, he averred that on the 30th day of December, 1898, Knost and Wilhelmy, knowing the *the* insolvency of the firm, and with intent to prefer Bertha Knost, the defendant, a creditor of the said firm, and with further intent to defraud the other creditors of the firm, withdrew from the funds of the firm $2,280, and paid the same over to said Bertha Knost, who then had reason to know that the firm was insolvent, and that the payment to her was a preference of her as a creditor of the firm. The bill further averred that Albert Knost, one of the members of the firm, on January 6, 1899, then having knowledge of the firm's insolvency, and in order to hinder, delay and defraud the creditors of the firm, withdrew five hundred dollars from the funds of the firm and paid it over to defendant, Bertha Knost, without any consideration therefor.

2 The complainant further averred that Bertha Knost was insolvent, had no money or property in her own right, and that unless restrained from so doing would dispose of the money thus illegally coming into her hands.

The prayer of the bill was for a preliminary injunction restraining the defendant from transferring or in any way disposing of the $2,280 and the $500, until further order; and for a decree on final hearing for the payment over by her to the trustee of these sums.

Complainant made a motion for a preliminary injunction in accordance with the prayer of the bill and supported the same by an affidavit. The motion was resisted on the ground that the court had no jurisdiction to entertain the bill. The district court made an order denying the motion, and the trustee was allowed an appeal therefrom, and perfected the same.

Upon such appeal, the question of the jurisdiction of the district court necessarily arises. The members of the court find much difficulty in reaching a satisfactory conclusion thereon. The court, therefore, orders that the following question be certified to the Su-

preme Court of the United States, and an answer be respectfully requested:

Question. Has a district court of the United States jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy appointed by it against a fraudulent grantee or transferee of the bankrupt resident in its district to recover the property belonging to the estate of the bankrupt, and by him fraudulently conveyed to defendant?

WM. H. TAFT,
HORACE H. LURTON,
C. D. CLARK,
Judges of the U. S. Circuit — of Appeals for the Sixth Circuit.

3 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of W. A. Hicks, trustee, *v.* Bertha Knost was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 8th day of January, A. D. 1900.

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. W. A. Hicks, trustee, *v.* Bertha Knost. Questions certified to the Supreme Court of the United States.

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No. 512.

Brief for Appellant.

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UNITED STATES SUPREME COURT

No. 512.

Filed April 26, 1900.

W. A. HICKS, Trustee in Bankruptcy of Albert Knost and Arnold Wilhelmy, Partners as Knost & Wilhelmy,

Appellant.

v.

MISS BERTHA KNOST,

Appellee.

IN BANKRUPTCY.

Brief for Appellant.

CHARLES M. PECK,

Counsel for Appellant.

Columbus, O:
Weekly Law Bulletin, Print.
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v.

MISS BERTHA KNOST,
Appellee.

IN BANKRUPTCY.

BRIEF FOR APPELLANT.

This case comes into this court by certificate from the United States circuit court of appeals, of the sixth circuit, and presents the following question: Has a district court of the United States jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy appointed by it against a fraudulent grantee or transferee of the bankrupt resident in its district to recover the property belonging to the estate of the bankrupt, and by him fraudulently conveyed to defendant?

In behalf of the appellant, we maintain that the district court has jurisdiction to entertain such an action.

Whatever jurisdiction the district court has to entertain such an action, is given by the bankruptcy act of July 1, 1898, and we must look to its provisions to ascertain what jurisdiction, if any, is conferred upon the district court and also for the nature and extent of it

The provisions of the act creating the courts of bank-

ruptcy, and investing them with jurisdiction, are in substance as follows:

"Section 2. That the courts of bankruptcy, * * * viz., the district courts of the United States * * * are hereby made courts of bankruptcy, and are invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * (7) to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as herein otherwise provided."

This section expressly invests the district courts with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to determine controversies in relation to bankrupts' estates, except as otherwise provided in the act.

More briefly stated still, they have such jurisdiction at law and in equity in bankruptcy proceedings as is necessary to determine controversies in relation to the bankrupt's estates, except as otherwise provided.

The controversies referred to cannot be those in reference to claims by creditors against the bankrupt's estate, for class 2, of this section provides for the disposition of such controversies by allowing or rejecting such claims, but the controversies referred to must be those in reference to the claims of the estate against third parties, or controversies arising in the collection of the estate. By section 70, subdivision *a*, the trustee is vested with the title of all the property of the bankrupt as of the date of the adjudication, including the property transferred in fraud of creditors; and in subdivision *e* it is provided that the trustee may avoid fraudulent transfers and recover the property or its value; and by section 67, subdivision *a*, all property fraudulently conveyed, incumbered or transferred is made assets to the estate and passes to the trustee, and it is made his duty to recover it by legal proceedings or otherwise; and by subdivision *f* of this section, all levies, judgments, attachments and liens obtained by legal process within four months before the adjudication and while the bankrupt was insolvent, are void and the property passes to the trustee discharged from such liens; and by section 47, subdivision *a*, it is made the duty of the trustee to collect and reduce to money the property of the estate.

It follows from these provisions that these controversies in relation to the estate must be between the trustee and some party, not a creditor, adverse to the estate in interest, and also must, from their nature, be controversies at law and in equity.

From the foregoing it is manifest that the district courts are vested with such jurisdiction at law and in equity as will enable them, in a bankruptcy proceeding, to determine controversies in relation to the estate between the trustee and an adverse party, except as herein otherwise provided.

Some United States courts in defining the jurisdiction conferred by the present bankruptcy act, have attempted to apply the decisions under the old act of 1867 to the new, and have held, in substance, that section 2 only confers jurisdiction upon district courts to entertain bankruptcy proceedings pure and simple, as distinguished from actions at law and suits in equity; but in so doing, they have made no effort to construe the section from the language used as we have done above, but have assumed that the new act in its jurisdictional provisions is substantially the same as the old act, and that the decisions under the old are therefore fully applicable to the new.

Abraham v. Bernheimer, 93 Fed. Rep., 767.
In re Scott, 1 Fed. Rep.
Burnett v. Morris Mercantile Co., 91 Fed. Rep., 365.

The provisions of the act of 1867, in reference to the jurisdiction of the district courts, were in substance as follows:

The citations are from Bump on Bankruptcy, 8th ed.

Sec. 563. "The district courts are constituted courts of bankruptcy, and shall have * * * original jurisdiction in all matters and proceedings in bankruptcy."

Sec. 771. "The jurisdiction vested in courts of the United States, in the cases and proceedings hereinafter named, shall be exclusive of the courts of the several states." * * "6—Of all matters and proceedings in bankruptcy."

Sec. 4972. "The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

"First. To all cases and controversies arising between the bankrupt and creditors * * * under the bankruptcy.

"Second. To the collection of all the assets of the bankrupt.

"Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

"Fourth. To the adjustment of the various priorities and conflicting interests of all the parties.

"Fifth. To the marshaling and disposition of the dividend funds and assets, so as to secure the rights of all parties and due distribution of assets among all the creditors.

"Sixth. To all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution

and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy," etc.

Sec. 4973. "The district courts shall be always open for transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same power and jurisdiction * * * as when sitting in court."

Sec. 4979. "The several circuit courts shall have * * * concurrent jurisdiction with the district courts * * * of all suits at law and in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, and by such person against an assignee touching any property transferable to or vested in the assignee."

An inspection of section 563 alone shows that "original jurisdiction in all matters and proceedings in bankruptcy" may include all controversies as to the estate of every kind.

In re Christie, 3 Howard, 291 (313).

But the jurisdiction of "all matters and proceedings" in bankruptcy in section 711 is made exclusive of the state courts, and, since the state courts have always been held to have jurisdiction of controversies at law and in equity arising under the act, it follows that the jurisdiction under section 563, as limited in section 711, can not include controversies at law and in equity, but refers to bankruptcy proceedings only.

Bump. Bkcy., 220, 323 (8th ed.).

The jurisdiction conferred originally in section 563 is further explained and modified in section 4972, which provides that the jurisdiction conferred upon the district courts as courts of bankruptcy (being the limited jurisdiction of section 563), shall extend to some six classes of matters specially enumerated, and these various matters must be construed and limited to those matters embraced within the general jurisdiction conferred in section 563, and therefore can not include controversies at law and in equity.

Smith v. Mason, 14 Wal., 419.

Again, section 4973 provides that the district courts shall always be open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy, and that their power and jurisdiction as such courts shall be exercised as well in vacation as in term time, and since controversies at law and in equity could not be heard whenever the court might be open or in vacation, but only in term time, it is apparent that the jurisdiction is limited to bankruptcy proceedings pure

and simple, and does not include controversies at law or suits in equity.

By section 4979, jurisdiction is expressly conferrerd on the circuit courts and district courts of controversies at law, brought by the assignee or against him, in reference to adverse interests, and it follows that the prior jurisdiction given to the district courts in section 563 was not intended to be included in the jurisdiction given in this section, and thereby to include controversies at law and in equity.

Morgan v. Thornhill, 11 Wal., 65.

Smith v. Mason, 14 Wal., 419.

It would seem from the foregoing that the language in the various provisions in every way limits and confines the jurisdiction to the bankruptcy proceedings alone, and that this jurisdiction was to be exercised in a summary manner, and not in the formal way required in actions at law or suits in equity, and the courts as appears from above citations have held in accordance with these views.

In order to compare the provisions of the present act as to the jurisdiction of the district court with those of the old above set out, I shall state again in substance the provisions of section 2, it being the only section conferring jurisdiction upon the district courts.

Sec. 2, * * * "The district courts are hereby made courts of bankruptcy, and are hereby vested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms, as they are now or may hereafter be held, * * * to cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

The two acts are the same only in the parts constituting district courts courts of bankruptcy, and in all other respects are different in their language. The new invests the district courts with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to do some nineteen different classes of things, one of which is the collection of the estate and determination of controversies in relation thereto, while the old gives the court original jurisdiction in all matters and proceedings in bankruptcy, and by other provisionns limits it to strict proceedings in bankruptcy.

Jurisdiction is the power to enable and determine a matter, and its nature and extent must depend on the matter to be entertained and determined, and since the old act gives

the power to entertain and determine all matters and proceedings in bankruptcy as restricted by the other provisions, the jurisdiction conferred will be such as is necessary to administer such a proceeding, and is special and limited, and must be exercised in a summary manner, and not in accordance with the forms of procedure at law or in equity.

On the other hand, under the new act, the power to entertain and determine, in a bankruptcy proceeding, the nineteen classes of matters specifically named is directly given, and the jurisdiction must therefore be of the nature and extent necessary to entertain and determine each matter named, and since some of these are merely formal and administrative, and others are controversies at law or in equity (such as the determination of controversies in relation to the estate above shown), the jurisdiction conferred must be special and limited as to the former, and is to be exercised in a summary way, and as to the latter must be the broad general jurisdiction at law and in equity, necessary to determine controversies at law and in equity, and must be exercised in the formal manner required in such proceedings.

That such special and general jurisdiction may be exercised by the district courts is held in Smith v. Mason, 14 Wall. 419 (last paragraph of syllabus)

That this conclusion as to the nature of the jurisdiction is correct is further manifest from the fact that the language used is "such jurisdiction at law and in equity," etc., thereby expressly declaring the jurisdiction to be legal and equitable. Again, under the old act, the jurisdiction could be exercised as well in vacation as in term time, and could not therefore include the jurisdiction necessary to determine controversies at law and in equity; but under the new the jurisdiction is to be exercised in bankruptcy proceedings in vacation, in chambers, and during the terms of court, to do the many special matters, some of which may be entertained in vacation and in chambers and others can only be heard during term time.

The new act further differs from the old by making no attempt to confer jurisdiction generally in bankruptcy proceedings, and then explaining this general jurisdiction by stating specifically what it includes (sec. 4972); but on the contrary, attempts to confer jurisdiction specially to do each thing that can possibly arise in bankruptcy proceedings.

From the foregoing it appears that the two acts are different in all their jurisdictional provisions, and have no feature common to both, and the decisions as to the nature and extent of the jurisdiction under the old can be of no aid in ascertaining and fixing the jurisdiction under the new, and the deci-

sions of those courts assuming the two acts to be substantially the same, are entitled to little weight, and the new act must be construed from its own language without regard to the decisions under the old.

Having shown that the jurisdiction conferred on the district courts is such jurisdiction at law and in equity as will enable them, in a bankruptcy proceeding, to determine controversies at law and in equity relating to the estate "except as herein otherwise provided," I now wish to consider the force now and effect of this exception.

The exception must refer to some other parts of the act providing for the determination of controversies relating to bankrupts' estates, and on inspection we find that section 23 gives the circuit court jurisdiction of certain "controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees and adverse claimants;" that section 26 provides that the "trustee may submit to arbitration any controversies arising in the settlement of the estate;" and that section 27 provides that the trustee may compromise "any controversies arising in the administration of the estate."

We thus find that there are three ways or methods of determining controversies in relation to bankrupts' estates, to which the trustee is a party, provided in the act, other than by determining such controversies in the district courts as provided in section 2.

It is evident, therefore, that these three methods are the ones referred to in section 2, under "except as herein otherwise provided," and the provision with the exception would be in substance "such jurisdiction as will enable them to determine controversies except as they may be determined in the ways otherwise herein provided," viz: In sections 23, 26 and 27.

In opposition to this view, it is claimed, and some courts have so held, that the exception is intended to be a limitation on the power conferred, and not on the exercise of it, as above shown, and it is claimed that the exception is to be found in subdivision *b* of section 23, which is construed as a provision that suits by the trustee must be brought in the state courts, and thereby leaving the district courts with no jurisdiction to entertain suits between trustees and adverse parties.

In reply to this contention, we insist that in the nature of things an exception to a specific grant of power can only take away the power conferred to the extent that the exception clearly applies, but it is not intended to, and can not take away the power itself.

The Dollar Savings Bank v. The United States, 19 Wall., 227.

We can not suppose that congress having, in section 2, directly conferred power upon the district courts to determine controversies at law and in equity relating to bankrupts' estates, intended by the exception to take away that power and to thus leave the matter as if no provision had been made upon the subject; and if this contention be correct, then the district courts are without jurisdiction to entertain suits at law and in equity brought by the trustees, and their jurisdiction is limited to proceedings in bankruptcy strictly.

This position is not tenable, for it takes away from the district courts as courts of bankruptcy the power to entertain and determine those "controversies arising in bankruptcy proceedings" which are made the subject of appeal in section 24.

These controversies must be legal and equitable in order that they may be the subject of appeal, and they must be entertained and determined by courts of bankruptcy because the appeal is from courts of bankruptcy; and if section 24 is to have any force or effect, then the district courts as courts of bankruptcy must have jurisdiction of controversies at law and in equity, otherwise there can be no appeal from such courts.

Appeals in bankruptcy proceedings simply are provided for in section 25, but this section does not modify or affect section 24.

From the foregoing we must conclude that we can not construe subdivision *b* of section 23 as referring to the state courts and thus make it repugnant to section 2, class 7, and to section 24, and if we can give it some other reasonable construction consistent with these sections, it must be done.

Subdivision *b* is as follows:

"Suits by the trustee shall only be brought or prosecuted in the court where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

The bankrupt could only have brought suit in those courts having jurisdiction of the subject matter of the action, and which had the power to obtain jurisdiction of the person of the defendant according to existing laws, and the thing that especially points out the particular court where suit might be brought, is the power to obtain jurisdiction of the person of the defendant.

Many courts have jurisdiction of the subject matter, but only one court can obtain jurisdiction of the person, and this one is the court where the suit must be brought.

The section was not intended to define what courts have jurisdiction of the subject of the suits, but was only intended

to protect the defendant in his right to be sued in the court of his district, unless he by consent permitted some other court to entertain the suit against him.

He may, by consent, give a court jurisdiction of his person, but no one can by consent give to a court jurisdiction of the subject matter, and for this reason it is evident that this provision is not intended to affect or modify the jurisdiction of controversies conferred upon the district courts in previous sections.

A very similar provision is found in the federal statutes providing where suits against inhabitants of the United States must be brought. Sec. 739, which is in part as follows:

"No civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant."

No one for a moment would contend that this provision in any way is a limitation on the jurisdiction of the subject matter of actions conferred on the courts in other sections, and if the provision had been stated affirmatively instead of negatively it would be almost identical with the provision under consideration, and no one would maintain that it conferred jurisdiction of the subject matter upon the courts.

In support of the foregoing argument, I desire to offer the following authorities:

Carter, Trustee, v. Hobbs et al., 92 Fed. Rep., 594.
In re Chas. F. Sievers, 91 Fed. Rep., 366.
Davis v. Bohte et al., 9 Bk. News, 216; 92 Fed. Rep., 325.
Shutts v. First Nat'l Bank, 98 Fed. Rep., 705.

The argument and citations set out in this brief are the same as those set forth in our brief filed in the circuit court of appeals, except that we have added the case of Schultz v. Bank, recently decided by Judge Baker, of the United States district court of Indiana, and counsel for complainant in this case, filed a copy of our printed brief in support of his case, and the learned judge has largely followed it in his opinion.

In conclusion we respectfully submit that the United States district courts have jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy against a fraudulent grantee of the bankrupt to recover the property fraudulently transferred.

Respectfully submitted,

CHARLES M. PECK,

Counsel for Appellant.

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In support of the foregoing argument I desire to offer the following authorities:

Carter, Trustee, v. Hobbs et al., 92 Fed. Rep., 801.
In re Chas. F. Stivers, 91 Fed. Rep., 866.
Lyons v. Preble et al., 9 Fed. Cas., 216; 92 Fed. Rep., 325.
Shultz v. Rival Mfg. Comp., 96 Fed. Rep., 705.

The arguments and citations set out in this brief are the same as those set forth in our brief filed in the circuit court of appeals, except that we have added the case of Schultz v. Bank, recently decided by Judge Baker, of the United States district court of Indiana, and counsel for complainant in this case, filed a copy of our printed brief in support of his case, and the learned judge has largely followed it in his opinion.

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IN BANKRUPTCY.

BRIEF FOR APPELLEE.

The question raised by the certificate in this case is: Whether the district court, as a court of bankruptcy, has jurisdiction to set aside a payment of money to a third party as fraudulent against creditors of the bankrupt, and to order the repayment of the money to the trustee where, the bankrupt, the trustee and such third party are inhabitants of the same district.

The determination of this question will depend upon the construction placed upon the Bankruptcy Act of 1898, providing for jurisdiction, and the following provisions are presented for consideration:

"Section 2. That the courts of bankruptcy, * * * viz.: the district courts of the United States * * * are hereby made courts of bankruptcy and are invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to * * * (7) cause the estates of bankrupts to be collected reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

"Section 23. Jurisdiction of the United States and state courts.

"*a.* United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"*b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"*c.* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses numerated in this act."

We are, of course, seeking to determine what the legislative body intended when it used the language quoted—not what should have been enacted, but what, in fact, was the intent of the body when fixing the limits of jurisdiction as contained in the act.

Upon this we beg to submit the following suggestions:

First: To discover intent we must primarily examine the language used.

The district courts by section 2, are given such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided.

Now, what would one ordinarily understand by this language? Jurisdiction to determine controversies with respect to bankrupts' estates is given generally, but subject to this exception: whenever in the act there is a provision by whose terms controversies with reference to the bankrupt's estate must be determined otherwise than by the district courts, then that provision shall determine the jurisdiction, and the provision in section 2, paragraph 7, shall not be operative. This must certainly be the meaning, otherwise there can be no meaning whatever attached to the exception appended to paragraph 7. It surely had some purpose, because it is the only exception that is attached to any of the nineteen specifications of jurisdiction contained in section 2.

If this is the intent and meaning of paragraph 7, then we must look further in the act to find what provision is elsewhere made for "otherwise" determining controversies which may arise in relation to the bankrupt's estate.

In searching the act for other provisions our attention is attracted by the caption to section 28, "Jurisdiction of United States and state courts." While the caption to a section may not be absolutely conclusive of what the subject matter of the section is, yet when we are seeking to determine what the legislative intent is, certainly the expression of that body as contained in a statement of what the body is about to enact is a matter of the highest importance. If a man were to open his statement by saying: "I am about to speak to you with reference to the Coliseum at Rome," and should then discourse for an hour upon the architecture, history and general objects of that building without mentioning the name of Rome, certainly, if a question arose as to whether the man was speaking of the amphitheater at Rome or the one at Pompeii, or the less pretentious one at Verona, the fact that the man stated in the outset that he was about to speak of the one at Rome would be conclusive of the fact that he *intended* to speak of the one at Rome, although what he said might apply in many respects to one or both of the other two.

So here, after this statement of the subject-matter of section 28, we must certainly expect to find in it some provision which will necessarily result in jurisdiction by the United States courts and also some in jurisdiction in the state courts, although one or both of the courts may not be mentioned by name.

Paragraph *a* of this section provides that the circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants. In other words, if a controversy should arise between the trustee and adverse claimants with reference to property acquired or claimed by the trustee, the circuit court shall have jurisdiction of the cause if the bankrupt could have gone into that court in case the controversy had arisen between him and the adverse claimants. Now, when could the bankrupt have gone into that court in case the controversy had been between him and the adverse claimants? Only in case the controversy involved two thousand dollars. If the controversy did not involve two thousand dollars, neither the bankrupt nor the adverse claimants could have gone into the circuit court, and the suit must be brought somewhere else, and the next paragraph determines where.

Paragraph *b* allows the trustee to bring and prosecute suits in those courts only where the bankrupt might have brought or prosecuted them if bankruptcy proceedings had not been commenced, unless the defendant consents that they shall be brought elsewhere.

This paragraph is obviously intended to regulate the place and not the subject of the action—the jurisdiction of the person and not of the subject matter—because consent can give jurisdiction of the person, but not of the subject matter. The trustee, under this paragraph, can prosecute suit in such courts, and in such courts only, as the bankrupt could have proceeded in, had no proceedings in bankruptcy been commenced. Now, it is important to ask, where could a bankrupt have sued such adverse claimants had no proceedings in bankruptcy been begun? This certainly must be the test, if the paragraph has any meaning at all. He certainly could *not* have sued in the district courts, because they have no jurisdiction of controversies between private parties of the nature that we are considering.

He could *not* have sued in the circuit courts if he and the third parties were citizens of the same district as, they are in the case at bar He *could* have sued in the circuit courts if he were a citizen of a different district from the proposed defendant; and he *could* have sued in the state courts even if he and a third party were citizens of the same district. When we ask, then, where the bankrupt could have sued the appellee in the controversy at bar had no proceedings in bankrupty been commenced, and the two parties had appeared simply as two citizens of the same district, there certainly can be but one answer—he would have had to go into the state courts of competent jurisdiction, since there would have been no others to which he could have resorted.

Now, it is no objection to this conclusion that the section does not mention the state courts by name, for the reason that the United States statutes can not confer jurisdiction on state courts. They can, however, provide that a person shall resort to a state court, if he has a cause of action which is recognized by the jurisprudence of the country and desires to enforce it, by declaring that he shall not resort to the United States courts with a cause of action of that nature, or against a defendant who resides in the same district with him and such a provision will determine that the person must resort to the state courts, if he wishes to settle his controversy, quite as effectively as if the state courts had been mentioned by name. The mentioning by name could have added nothing. The fixing of the test as to where the trustee shall proceed, if he desires to proceed at all, is what is effective. When we find where the bankrupt would have had to have brought his action against the proposed defendant we have determined where, and where alone, the trustee can proceed, whether it be in the United States courts or in the courts of the state.

If our analysis of the words of the statute be correct, then the intent of the legislative body was that: The courts of bankruptcy should have jurisdiction of the nineteen subjects mentioned in section 2 and including controversies in relation to the estates of bankrupts, except that when a controversy

arises between a trustee and a third party, stranger to the proceedings, then the trustee must bring his action in the circuit court, if the fact of amount and citizenship permit, and, if they do not, his action must be brought in the state courts having jurisdiction of such controversies. This intent gives adequate meaning to all the words of the statute, and is the only one, as it appears to us, that does.

As to what controversies with reference to the bankrupts' estates the bankrupt courts would have cognizance of under paragraph 7 of section 2, it would probably be useless now to inquire; certainly such as arise between the trustee as such and the bankrupt himself, and the trustee and the creditors of the bankrupt would be within this jurisdiction; and probably many others may arise in time out of the power to appoint receivers and other extraordinary powers granted the bankruptcy court under the nineteen specifications, but it is sufficient for the determination of this action that, when a controversy arises between the trustee and a stranger to the proceedings, the trustee can only bring suit against such stranger in the state courts, unless by reason of diverse citizenship and limit of amount, he may resort to the circuit courts.

It has been further suggested that section 26, providing for arbitration of controversies, and section 27, as to compromises, are also exceptions to the jurisdiction of the bankruptcy courts to determine controversies in relation to bankrupts' estates, as provided by the clause appended to paragraph 7 of section 2.

This is probably so, and does not detract in any degree from the force of the suggestion that the provision of section 23 is another. It occurs, however, that there may be some question as to whether the power to direct an arbitration, as provided in section 26, or the power to approve a compromise, as provided in section 27, is the exercise of jurisdiction to determine causes in the sense that we ordinarily speak of the jurisdiction of courts.

We submit that the words of the act do not support the contention of the appellant, but do disclose an intent on the part of the legislative body that the parties shall resort to the state courts in controversies where the facts are as in the case at bar.

Second: While the words used must, in the first instance, be looked to to determine intent, yet other circumstances may be of weight in connection with the words used. In connection with the wording of the act we desire to direct the attention of the court to the fact that the contention of the appellant is in direct conflict with the long-established policy of the United States with reference to the jurisdiction of its courts, while the contention insisted upon by the appellee is in strict accordance with this policy.

If the construction claimed by the appellant be correct, then the trustee may summon parties into the district courts in controversies which may arise between him and strangers

to the bankruptcy proceedings from all quarters of the district for a matter of $10, as well as a matter of $10,000, and that, without reference to the fact that the trustee and such parties may all be residents of the same district. All barriers as to amount, as well as location, are thrown down. The long-established law that petty controversies, formerly under $500, now under $2,000, should be litigated in the state courts at the place where the litigants live and where they can be carried on with the least possible expense and inconvenience, would by such construction be at once abrogated and a smaller limit placed upon the jurisdiction of such courts than now exists upon that of a country justice of the peace in the state of Ohio. The policy of Congress in this regard has been to further restrict rather than to extend the field of possible litigation permitted in the United States courts, as instanced by raising the limit from $500 to $2,000, and other instances that might be mentioned. Surely, if it was the intention of this act, once for all, to reverse this policy, it should be shown by most unmistakable language. The court will find this point stated with great terseness and force by Judge Thompson when passing upon the motion of this case below. See 94 Fed. Rep. 625.

Third: But, not only does the policy of Congress with reference to the courts of the United States sustain the contention of the appellee, as well as the language of the act, but the nature of the provision of section 23, when viewed in the light of the previous Bankruptcy Act of 1867, have the same effect. When trying to reach the intention of Congress, we must remember that it had the act of 1867, with all the decisions with reference to it, before it, and that it must be assumed that Congress attempted to avoid any possible doubts that may have arisen as to the application of that act. It will, in this connection, be observed that paragraph *b* of section 23 is entirely new. There was no such provision in the act of 1867. What object was to be accomplished by it? Section 4979 of the Revised Statutes of the United States (part of the act of 1867), which confers jurisdiction on the circuit courts, is strikingly similar to the language of section 23, paragraph a, except that the jurisdiction therein conferred shall be concurrent with that of the district courts. There was much controversy as to jurisdiction under the old act, and the act was repealed before much of it was determined by the supreme court. It would seem that the object which must have been intended by paragraph b of section 23, when viewed in connection with the former act, was to put the question of where the trustee should litigate his controversies beyond the question of a doubt: he can only go into those courts where the bankrupt could have gone, in case the controversy had been between him and the adverse party. This was to be the simple test to be applied in every case. If the jurisdictional requirements for a suit in the federal court were present, he

could go into the circuit court, as provided in paragraph *a*; if not, then he must resort to the state courts, as mentioned in the caption to the section.

We can not do better with reference to the circumstances which led up to the enactment of these provisions in the act of 1898, with reference to jurisdiction, than to refer the court to the very extended historical preface to the opinion of the judge of the circuit court of appeals, in deciding the case of In the Matter of D. Abraham, 98 Fed. Rep. 767.

In the further consideration of the intent of Congress in the enactment of this law, it is a matter of some consequence at least to find that the gentlemen who had this bill in hand, both in the senate and in the house, thought that the bill had the effect to limit the jurisdiction of district courts, as contended by the appellee, and that the bill was considered as having this effect in the committees which considered it. See remarks of the judge in deciding the case of Carter v. Hobbs, 92 Fed. Rep. 594.

Fourth: The decided weight of authority, so far as the question has been in issue, is in favor of the appellee's position.

The case of Carter v. Hobbs, 92 Fed. Rep. 594, must be considered as a decision in favor of the appellant herein, and is based upon two considerations: 1. That if it were held that the trustee must go into the state courts in all cases where the federal requirements as to jurisdiction were not present, then the bankruptcy courts would be shorn of their principal function; and, 2. The bankrupt could not by any possibility succeed in such a suit as the statute contemplates he must have been able to bring in order to authorize the trustee to proceed.

As to the first ground. The bankruptcy courts would not be shorn of any power by the construction for which we insist, which it is at all necessary that they should exercise, or which is at all extraordinary that they should not exercise. Jurisdiction of insolvents' estates has ordinarily been confided to probate courts and other courts of limited jurisdiction in the states, and while they have distributed the assets of the insolvents among their creditors, it has always been the law that when suits of a plenary character have arisen between the assignee and a third person, the assignee has been required to go into a court of general jurisdiction to settle the question and bring the fund, if any, into the court of insolvency for distribution. The analogies in our jurisprudence have certainly been opposed to the position taken by the court.

As to the second ground. The fact that in a suit to set aside a fraudulent conveyance, for instance, the bankrupt would fail by reason of an estoppel to question his own act, would not affect the question of jurisdiction. The bankrupt could bring such a suit, the court having jurisdiction of the subject-matter, although he might fail in his proof, the ques-

tion of jurisdiction being an entirely different matter from the question of success in maintaining the suit upon the evidence of fraud.

The case *In re* Sievers, 91 Fed. Rep. 366, and Davis v. Bohle, 92 Fed. Rep. 325, cited by the appellant, are one and the same case, the first citation being a decision of the case in the district court, the second in the circuit court of appeals. The question in *In re* Sievers was not as to jurisdiction to entertain the suit of a trustee at all. No trustee had been appointed in the case. The question, and the only question in the case, was as to whether proceedings in bankruptcy superseded an assignment under state laws. The court held that they did, and the court of appeals affirmed the judgment. It is true that the district judge went into a discussion of the question of jurisdiction, but it was not involved in the case, and when the case was affirmed in the court of appeals not one word was said as to jurisdiction, and no question was, in fact, decided in the case in either court except the one, that bankruptcy proceedings did supersede assignment proceedings for the benefit of creditors under state law.

These cases, together with the case of *Shultze v. The First Nat. Bank*, 98 Fed. Rep., 705, represent the support of the appellant in his position.

The following decisions of district courts have upheld the contention of the appellee:

Burnett v. Morris Mer. Co, 91 Fed. Rep. 365.
Mitchell v. McClure, 91 Fed. Rep. 621.
Hicks v. Knost, 94 Fed Rep. 625.

And the following decision of the circuit court of appeals, for the fifth circuit, was to the same effect:

In re Abraham, 93 Fed. Rep., 767.

On the whole case, we submit that the question as certified should be decided in the negative.

Respectfully submitted,

FREDERICK HERTENSTEIN,

Counsel for Appellee.

Supreme Court of the United States.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of JOSEPH McD. SCOTT, doing business as J. McD. SCOTT & CO., Plaintiff in Error,

vs.

JOHN C. McCLURE and W. REED & COMPANY.

No. 745 October Term, 1898.

In Error to the District Court of the United States for the Western District of Pennsylvania.

To the Honorable, the Judges of said Supreme Court of the United States:

The petition of S. Duffield Mitchell, Receiver in Bankruptcy of Joseph McD. Scott, doing business as J. McD. Scott & Co., plaintiff in error above named, respectfully represents.

That the record in the above entitled case presents solely the question of the jurisdiction of the District Court of the United States as a court of bankruptcy, to entertain an action of replevin, which the receiver in bankruptcy has brought, to recover possession of goods, alleged by him to have been transferred by the bankrupt in fraud of the rights of the creditors of the bankrupt.

That the writ of error in said case is taken under section 5 of the Act of March 3rd, 1891, and the only question

in issue is the question of the jurisdiction of the court below, and, as your petitioner is advised, the said case is such a one as may be advanced on motion, upon order of your Honorable Court, under rule No. 32.

Wherefore your petitioner prays your Honorable Court that said case may be advanced for oral argument upon the argument list to such time for hearing at October Term, 1898, as your Honorable Court may find proper and convenient.

And he will ever pray, etc.

S. DUFFIELD MITCHELL,
Receiver, etc., Petitioner.

Commonwealth of Pennsylvania, }
County of Allegheny. } *ss.*

Before me personally appeared S. Duffield Mitchell, who, being duly sworn according to law, deposes and says that he is the receiver in bankruptcy of Joseph McD. Scott, doing business as J. McD. Scott & Co., plaintiff in error in the above entitled case, and that the statements made in the foregoing petition for the advancement of the above cause are true and correct to the best of affiant's knowledge and belief.

S. DUFFIELD MITCHELL.

Sworn to and subscribed before me }
this 13th day of April, A. D. 1899. }

JAMES S. CRAWFORD,
Notary Public.

Supreme Court of the United States.

No. 237 OCTOBER TERM, 1899.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of JOSEPH McD. SCOTT, doing business as J. McD. SCOTT & COMPANY, Plaintiff in Error,

vs.

JOHN C. McCLURE and W. REED & COMPANY.

In Error to the District Court of the United States for the Western District of Pennsylvania.

Statement of the Case.

The plaintiff in error is a citizen of Pennsylvania, and was appointed receiver and trustee in bankruptcy of J. McD. Scott & Co., by the District Court of the United States for the Western District of Pennsylvania. He brought an action of replevin against the defendants, residents of said Western District of Pennsylvania, to recover the possession of personalty stated in the writ to be of the value of $2,500. The United States Marshal executed the writ and delivered the property to the plaintiff. The defendants then obtained a rule to show cause why said writ of replevin should not be abated and restitution of the property be made to the defendant, on the ground that the said court had no jurisdiction to entertain such action. To this rule the plaintiff made answer that he took the property upon the claim that the same had been conveyed by the bankrupt to the defendants without consideration and in

fraud of the Bankruptcy Act, and of the rights of the creditors of said bankrupt, and that no title thereto had passed to said defendants as against the plaintiff by reason of the premises. On argument of said rule and answer, the District Court entered an order that the writ in replevin be abated for the reason that the Bankruptcy act of July 1st, 1898, did not confer upon said court jurisdiction to entertain a plenary action brought by the trustee in bankruptcy to recover property fraudulently transferred by the bankrupt. To this ruling, counsel for plaintiff in error excepted and sued out a writ of error to this court.

Assignments of Error.

FIRST. The learned District Court erred in making the following decree:

> "And now, to-wit, February 4th, 1899, the motion to abate the replevin writ in the above stated case, having been argued, the Court upon consideration thereof, orders and directs that the said writ of replevin shall be abated for the reasons set forth in the opinion filed herewith."

SECOND. The learned District Court erred in not dismissing the motion made by the above named defendants to abate the writ of replevin in the above stated case.

Argument.

The question raised upon this record is whether the District Court acting as a court of bankruptcy, has jurisdiction to entertain a suit of the trustee in bankruptcy brought to recover property, alleged to have been transferred by the bankrupt in fraud of the bankrupt act, the plaintiff and the defendants being citizens of the Western Judicial District of Pennsylvania.

The defendants aver that the District Court has no jurisdiction of such plenary action, since it is prohibited by section 23 (*b*) of the Bankrupt Act of 1898. The plaintiff maintains that the section has no such effect, and that the most that can be claimed for section 23 (*b*) is, that it takes away from the District Court the power to entertain a suit brought by a trustee in bankruptcy, to enforce a right *coming to him from the bankrupt;* but, as the bankrupt would be estopped by his own act, *he* could not recover in any court property *fraudulently* transferred by himself and the trustee's right to recover, therefore, is under and by virtue of the Bankrupt Act, and the right to sue in the District Court is not prohibited by the 23d (*b*) section of the Act.

We submit the following propositions:

First. That the jurisdiction and powers given to the bankrupt court under the Act of 1898 are as comprehensive as those given by the Acts of 1841 and 1867.

Second. That the decisions under the prior bankruptcy laws held that the District Court, as a court of bankruptcy, had jurisdiction to entertain plenary suits at law or in equity by virtue of the general power "*to collect the assets of the bankrupt estate.*"

Third. The courts even went so far as to hold, under the Act of 1867, that one District Court could enter-

tain such plenary suit brought by an assignee in bankruptcy who was appointed in the bankruptcy proceedings of another District Court.

Fourth. It is necessary for the District Court to exercise such jurisdiction in order to make the bankrupt court a complete and speedy forum for the administration and distribution of the bankrupt's assets; and the proceedings should be wholly within the Federal Courts.

Fifth. The Federal judicial power is co-extensive with the legislative power and Congress cannot compel State courts to litigate bankruptcy controversies.

Sixth. Section 23 (*b*) of the Act of 1898 is intended to apply only to suits in the District Court, brought by the trustee to enforce rights of action, which the bankrupt had prior to the adjudication in bankruptcy, and it has no application to a right of action which accrues to the trustee solely by virtue of the bankrupt act.

Seventh. The arbitration provision (Sec. 26) under the Act of 1898 would be rendered entirely nugatory if the District Court has no "*controversies*" to determine.

Eighth. The cases, relied upon by the lower Court, are not in point, nor do they discuss the question of the jurisdiction of the Bankrupt Court to entertain a plenary suit at law or in equity.

Ninth. Congress cannot constitutionally compel a State Court to entertain jurisdiction in either civil or criminal cases arising under Acts of Congress.

I.

A proper consideration of this case requires a comparison of the several provisions of the Bankruptcy Acts of 1841, 1867 and 1898, relative to the juisdiction and powers of the District Court of the United States, acting as a court of bankruptcy.

Each of these acts vested in the District Court jurisdiction in bankruptcy proceedings.

Bump on Bankruptcy (Ed. '98), 55, 63 and 119.

Jurisdiction and Powers Under the Act of 1841.

(A) Sec. 6. "The District Court in every district shall have jurisdiction in all matters and proceedings in bankruptcy, arising under this act; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said District Court shall be deemed always open. And the District Judge may adjourn any point or question arising in any case in bankruptcy into the Circuit Court for the district, in his discretion, to be there heard and determined; and for this purpose the Circuit Court of such district shall also be deemed always open.

(B) "And the jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy, arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

(C) Sec. 8. "That the Circuit Court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the District Court of the same

district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to, or vested in, such assignee."

Bump on Bankruptcy (Ed. '98) 55 and 57.

(**D**) SEC. 10. "That in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy it shall be the duty of the Court to order and direct a collection of the assets and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets * * * , or so much thereof as can be safely disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors * * * as often as once in six months from the time of the decree declaring the bankruptcy; * * * and all proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the Court within two years after the decree declaring the bankruptcy."

Bump on Baukruptcy, (Ed. '98,) page 58,

(**E**) SEC. 3. Substantially provided that the assignee in bankruptcy shall be vested with all the rights, titles, powers and authorities, to sell, manage and dispose of the estate and property of the bankrupt, of every name and nature, and to sue for and defend the same, subject to the order and direction of the Court, as fully as the bankrupt might before his bankruptcy.

Bump on Bankruptcy, (Ed. '98) page 52.

(**F**) Sec. 9. "That all sales, transfers and other conveyances of the assignee of the bankrupt's property and

rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy."

Bump on Bankruptcy, (Ed. '98) 57.

(G) Sec. 11. "That the assignee shall have full authority by and under the order and direction of the proper court in bankruptcy to redeem or discharge any mortgage, or other pledge or deposit, or lien upon any property, real or personal, whether payable *in presenti* or at a future day and to tender a due performance of the conditions thereof. And to compound any debts or other claims or securities due or belonging to the estate of the bankrupt."

Bump on Bankruptcy, (Ed. '98) 58.

Jurisdiction and Powers under the Act of 1867.

Rev. Stat, Sec. 4972, "The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend—

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

Bump on Bankruptcy, (Ed. '98) 119.

Rev. Stat. Sec. 5046 provided substantially as did Sec. 3 of the Act of 1841 (*supra* "E.")

Bump on Bankruptcy, (Ed. '98) 394.

Rev. Stat. Sec. 5062*b* provided substantially as did Sec. 9 of the Act of 1841 (*supra* "F.")

Bump on Bankruptcy, (Ed. '98,) 449.

Rev. Stat. Sec. 5066 provided substantially as did Sec. 11 of the Act of 1841 (*supra* "G.")

Bump on Bankruptcy, (Ed. '98) 454.

Rev. Stat. Sec. 5061 also provided that any controversy arising in the settlement of the bankrupt's estate should be submitted to arbitration in the manner specified.

Bump on Bankruptcy, (Ed. '98) 443.

Jurisdiction and Powers Under the Act of 1898.

Sec. 2. "That the Courts of Bankruptcy, as hereinbefore defined, * * * * are hereby made Courts of Bankruptcy and are hereby invested, within their respective territorial limits * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms as they are now or may be hereafter held * * * *

(3) Appoint receivers or the marshals upon application * * * * to take charge of the property of bankrupts after the filing of the petition, until it is dismissed or the trustee has qualified * * * *

(5) Authorize the business of the bankrupt to be conducted for a limited period by the receivers or marshals or trustee, if necessary, in the best interests of the estate.

(6) Bring in and substitute additional persons or parties in proceedings, when necessary for the complete determination of a matter in controversy.

(7) Cause the assets of the bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except, as herein otherwise provided * * * *

(15) Make such orders, issue such process and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act * * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Bump on Bankruptcy, (Ed. '98) 118 and 119.

Sec. 70 *a* provides substantially as did sec. 3 of the Act of 1841 (*supra* "E").

Bump on Bankruptcy, (Ed. '98) 92.

Sec. 70 *b* provides substantially as did sec. 9 of the Act of 1841 (*supra* "F").

Bump on Bankruptcy, (Ed. '98) 93.

Sec. 26 provides as follows:

"*a*. The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

"*b*. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint a third arbitrator.

"*c*. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury."

Bump on Bankruptcy, (Ed. '98) 442.

It will be seen, upon comparison of these three bankrupt acts, that the powers and jurisdiction of the District

Court, acting as a Court of Bankruptcy, are as complete and extensive in the Act of 1898 as they were under the Acts of 1841 and 1867.

II.

It has been ruled under the Act of 1867 that the jurisdiction of the District Court over suits at law and in equity is part of the general scope of power "*to enforce the collection of all the assets of the bankrupt.*"

Goodall vs. Tuttle, 7 N. B. R., 193; 10 Fed. Cas. 579.

Shearman vs. Bingham, 7 N. B. R., 490; 41 Fed. Cas. 1270.

(decided in an opinion by Mr. Justice Clifford), and cited and followed in

Lathrop vs. Drake, 91 U. S., 516.

In *Goodall vs. Tuttle, supra*, Judge Hopkins said of the Act of 1867,

> "The Act confers the power upon the District Courts to collect all the assets of the bankrupt, and to do all other acts necessary to be done in virtue of the bankruptcy. This by implication confers the authority upon the District Courts to entertain jurisdiction of suits in the name of the assignee against third persons, either at law or in equity, for the collection of the debts and the property of the bankrupt, and as such jurisdiction is not expressly limited to the District Courts where the proceedings are pending, and as no reason exists for such limitation, the courts are not warranted in restricting its jurisdiction to such district."

III.

The question was also mooted under the bankrupt Act of 1867, whether the assignee in bankruptcy, without regard to the citizenship of the parties could maintain a suit for the recovery of assets in a Circuit or District Court of the

United States, in any district other than that in which the decree of bankruptcy was made. This question was decided affirmatively in:

Shearman vs. Bingham, 7 N. B. R. 490; 21 Fed. Cas. 1270.

Lathrop vs. Drake, 91 U. S. 516.

In the *Shearman* case, Mr. Justice Clifford held that a receiver in bankruptcy could recover in *assumpsit* money alleged to have been paid by the bankrupt to defendant by way of preference, in a District Court other than the court in which the proceedings in bankruptcy were pending and the receiver appointed.

In the *Lathrop* case the Supreme Court, Mr. Justice Bradley delivered the opinion, held that an assignee in bankruptcy, appointed by the District Court of the United States for the Western District of Pennsylvania, in proceedings therein (the bankrupt and his assignée being residents therein) could recover assets in the Circuit Court of the United States for the Eastern District of Pennsylvania, the defendant residing in the Eastern District. Mr. Justice Bradley declared that:

> "The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit in the case of *Shearman vs. Bingham;* * * * * and we concur in the opinion there expressed, that the several District Courts have jurisdiction of suits brought by assignees appointed by other District Courts in cases of bankruptcy."

IV.

The question of the nature and extent of the jurisdiction of the District Court, acting as a court of bankruptcy, was fully considered and elaborately discussed by Mr. Justice Story in *Ex parte The City Bank of New Orleans, in re Christy, Assignee*, 3 Howard, 293, and this case has been

followed in all the case in which the question of jurisdiction has been considered under the Acts of 1841 and 1867.

A recital of the substantial facts of that case is important.

One Walden executed to the bank valid mortgages, which became a lien upon the real estate described therein.

Subsequently, he instituted suits in the State Court to set aside the mortgages.

The bank then proceeded to foreclose the mortgages in the State Court and secured an order of sale, and at the sale became the purchaser of the real estate.

Walden was then declared a bankrupt, and Christy, the assignee in bankruptcy, then began proceedings against the bank in the District Court (the Court of bankruptcy) to avoid the Sheriff 's deed, and the bank then raised the question of the jurisdiction of the District Court to entertain the said proceedings and presented to the Supreme Court of the United States a motion for a writ of prohibition to be issued to the District Court of the United States. The Supreme Court in holding that the District Court, as a Court of bankruptcy, had jurisdiction to entertain the suit by the assignee to avoid the mortgage and overruling the application for a writ of prohibition, said, in an elaborate opinion by Mr. Justice Storey, at *page 311:*

> "Upon the argument the principal questions which have been discussed are, first, what is the true nature and extent of the jurisdiction of the District Court sitting in bankruptcy? Second, whether if the District Court has exceeded its jurisdiction in the present case, a writ of prohibition lies from this court to that court to stay further proceedings. Each of these questions is of great importance, and the first in an especial manner having given rise to same diversity of opinion in the different circuits, and lying at the foundation of all the proceedings in bankruptcy, is essential to be decided in

order to a safe and just administration of justice under the Bankrupt Act.

"In the first place, then, as to the jurisdiction of the District Court in matters of bankruptcy. Independent of the bankrupt act of 1841, chap. 9, the district courts of the United States possess no equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them. Whatever jurisdiction, therefore, they now possess, is wholly derived from that act. * * * *

"The obvious design of the Bankrupt Act of 1841, chap. 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could exercise no effectual control."

After reviewing the provisions of the 10th, 3rd, 9th and 11th sections of the Act of 1841, as are set forth in this brief, *supra* "D", "E", "F" and "G", he proceeded, at *page 312*, as follows:

"From this brief review of these enactments it is manifest that the purposes so essential to the just operation of the bankrupt system, could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required the end, they should at the same time have withheld the means by which alone it could be successfully reached."

After quoting the 6th section of the said Act, as set forth in this brief, *supra* "A" he proceeded:

> "If the section had stopped here, there could have been no reasonable ground to doubt that it reached all cases where the rights, claims and property of the bankrupt, or those of his assignee are concerned, since they are matters arising under the act, and are necessarily involved in the due administration and settlement of the bankrupt's estate. In this respect the language of the act seems to have been borrowed from the language of the Constitution, in which the judicial power is declared to extend to cases arising under the Constitution, laws or treaties of the United States. But the section does not stop here, but in order to avoid all doubt it goes on to enumerate certain specific classes of cases to which the jurisdiction shall be deemed to extend, not by way of limitation, but in explanation and illustration of the generality of the preceding language."

After quoting the language of the 6th section, as set forth in this brief, *supra* "B," he thus proceeded:

> "This last clause is manifestly added in order to prevent the force of any argument that the specific enumeration of the particular classes of cases ought to be construed as excluding all others not enumerated, upon the known maxim, often incorrectly applied, *expressio unius est exclusio alterius.*"

At *page 320*, he said:

> "Congress did not intend to trust the working of the bankrupt system solely to the State courts of twenty-six States, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is, by the Constitution,

competent to all such purposes; and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do."

Speaking in reference to section 10 (*supra* "D"), he said:

"Construing the language of the 6th section as we construe it, adequate means are given; construing it the other way, and it excludes the jurisdiction, if not of the whole subject, at least of most of the important parts of the system, and they are left solely to the cognizance of the tribunals of twenty-six different States, no one of which is bound by the acts of the others, or is under the control of the national courts. If it be admitted (what cannot well be denied) that the District Court may order a sale of the property of the bankrupt, under this section, how can that sale be made safe to the purchasers, until all claims thereon have been ascertained and adjusted? How can any distribution of the assets be made until all such claims are definitively liquidated? How can the proceedings be brought to a close at all, far less within the two years, unless all parties claiming an interest, adverse or otherwise, can be brought before the Bankrupt Court, to assert and maintain them? Besides, independently of the delays which must necessarily be incident to a resort to State tribunals to adjust the matters and rights affected by or arising in bankruptcy, considering the vast number of cases pending in those courts, in the due administration of their own jurisprudence and laws, there could hardly fail to be a conflict in the decisions, as to the priority and extent of the various claims of the creditors, pursuing their remedies therein in distinct and independent suits, and perhaps, also, in different State tribunals of co-ordinate jurisdiction.

These are but a few of the cases which may be put to show the propriety, nay, the necessity, of the jurisdiction of the District Court to the full extent of reaching all cases arising out of the Bankrupt Act.

"The truth is (as has been already asserted) that in no other way could the bankrupt system be put into operation, without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges and expenses, could be safely relied on, when the whole jurisdiction was confided to a single court, in the collection of the assets; in the ascertainment and liquidation of the liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such times and in such a manner as should best subserve to the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor or person, having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or his remedies in the State tribunals; and finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time the whole proceedings in bankruptcy. Sound policy, therefore, and a just regard to the public as well as private interests, manifestly dictated to Congress the propriety of vesting in the District Court full and complete jurisdiction over all cases arising, or acts done, or matters involved, in the due administration and final settlement of the bankrupt's estate; and it is accordingly, in our judgment, designedly given by the 6th section of the act. In this view of the matter, the District Court has not exceeded its jurisdiction in en-

tertaining the present suit, but it has full power and authority to proceed to the due adjudication thereof upon its merits."

V.

Mr. Justice Story, in the case of *Mitchell vs. Manufacturing Co.*, 2 Story, 648, 17 Fed. Cas. 497, said, in respect to the Bankrupt Act of 1841:

"The judicial power has, under the Constitution, always been construed to be co-extensive with the Legislative power, upon the plain ground that the Constitution meant to provide ample means to accomplish its own ends by its own courts. Now, looking to the many objects and purposes of the Bankrupt Act of 1841 (chap. 9), it would seem strange that Congress should not have provided all the necessary and proper means to accomplish all its purposes. It is clear that Congress has no right to require that the State courts shall entertain suits for such objects and purposes. The States, in providing their own judicial tribunals, have a right to limit, control and restrict their judicial functions and jurisdiction according to their own mere pleasure. They may refuse to allow suits to be brought there 'arising under the laws of the United States,' for many just reasons; first, that Congress are bound to provide such tribunals for themselves; second, that the State courts are not subject to the legislation of Congress as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own courts, and the rights of their own citizens, and be attended by great expense to the State, as well as great delays in the administration of justice, to allow their courts to be crowded with suits, arising under the laws of the United States; and, fourthly, as in the present case, that it would involve the State courts in almost endless examinations and discussions of the principles

and bearings of the bankrupt law, confessedly a system novel in our jurisprudence, intricate in its details, and involving questions exceedingly complicated and difficult in its practical application. Suppose, upon considerations of this sort, any State Legislature should prohibit its own courts from taking cognizance of any causes arising under the bankrupt act, no one could doubt it was a perfectly constitutional exercise of authority, and not justly to be complained of, as a want of comity or of justice. A due regard of a state to its own rights, and its duties to its own citizens, may require such a course, in order to prevent oppressive delays and obstructions in the actual administration of home justice; and, at all events, might justify it in preferring such claims to those belonging properly to the national jurisdiction. Besides all these considerations, there is one which cannot but be deemed of paramount importance in the administration of a system of bankruptcy, as to its uniformity, promptitude, regularity and efficiency in carrying into effect all its provisions. The Courts, which are to administer such a system, must possess not only jurisdiction at law, but in equity; not only a right to proceed in a formal way, but to act summarily; not only to hold regular terms, but to be always open; not only to be bound to act but to be governed by uniform rules and principles of interpretation and action, at least so far as, as from the diversity of human judgments, such uniformity of rules, principles and pleadings can be looked to in practice. But what can be expected from the nature of state courts, organized upon no uniform system, governed by no uniform jurisprudence, and in their jurisdiction and modes of proceeding, admitting of almost endless diversity of practice and action? So far from any system of bankruptcy being capable of any uniformity of action

throughout the United States, under such circumstances, it would be in no two states, perhaps in no two tribunals of the same state, the same. And if every decision in a state tribunal was to be subject to the appellate jurisdiction of the Supreme Court of the United States, instead of the proceedings in bankruptcy being completed, as the Act of 1841 (chap. 9 sec. 1), manifestly contemplates, within two years from their commencement, a half century might elapse before such a consumation."

The same justice further said:

"Let us look for a moment at some of the provisions of the Act to see, what the courts, sitting in bankruptcy, are required to do. We have already seen, by the 10th section of the Act of 1841, that it is required, 'That all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the Court within two years after the decree declaring the bankruptcy.' How is this to be done unless the Court possesses jurisdiction, co-extensive with all the subject matters in bankruptcy, to adjust and force all claims? How can this be enforced, if the entire jurisdiction to collect debts, and to settle controversies in bankruptcy, belong exclusively to the state courts? What control can the courts of the United States, sitting in bankruptcy, exercise over the state courts to regulate, or to speed their proceedings? Besides, the same section of the Act declares: 'That in order to insure a speedy settlement and close the proceedings in each case of bankruptcy, it shall be the duty of the court to order a direct collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable, consistently with a due regard to the interests of the creditors.' Now, here the end is required of the

Court, and can it reasonably be doubted that the means are also given the Court to accomplish it? Construe the clause in the sixth section of the Act of 1841, where it extends the jurisdiction of the District Courts 'to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution, and close of the proceedings in bankruptcy,' to include the jurisdiction to entertain suits to adjust all adverse claims, and to collect all outstanding debts (as its terms are sufficiently comprehensive to include), and we have exactly such a jurisdiction commensurate to the end. Construe it otherwise, and the Court sitting in bankruptcy is crippled and maimed; and we require it to move onward when it is chained to the earth."

"These are some of the grounds, which satisfy our minds, that Congress did not intend to leave the bankrupt system, for its practical operation, or success, or efficiency, to the good pleasure or discretion of the States, or to their voluntary and gratuitous efforts, to enforce or sustain it. Congress meant to provide a system capable of entire self-execution by the National tribunals, without the assistance or co-operation of the States, if the parties interested should choose to rely upon the National arm. The jurisdiction given to the District Courts is, as we construe it, ample for all such purposes; and we see no reason why the general language, in which it is given, should be restricted so as to defeat a single purpose of the Act."

Judge Amidon in

In *re Woodbury*, 98 Fed. Rep., at page 837,

relied upon the cases of *Ex parte Christy* and *Mitchell vs. Manfg. Co.* (*supra*) for the principle herein contended for and said:

"If not indispensable to a uniform system of bankruptcy throughout the entire country, it would

certainly be highly conducive to such a system that the federal courts should be vested with full jurisdiction, for the purpose of securing the highest degree of uniformity in the interpretation and administration of the law. This has been a controlling consideration in construing all previous bankrupt acts, and was, no doubt, present to the mind of congress in framing the statute of 1898."

The above language is in consonance with the general rule of construction of statutes, which was most clearly stated by Mr. Justice Field in the case of

Bernier vs. Bernier, 147 U. S. 242,

as follows:

"It is a general rule, without exception, in construing statutes, that effect must be given to all their provisions, if such a construction is consistent with the general purposes of the Act, and the provisions are not necessarily conflicting. All acts of the legislature should be so construed if practicable, that one section will not destroy or defeat another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the Act."

VI.

Under the act of 1898 the provisions relating to the bringing of suits to recover the assets of the bankrupt estate and to the jurisdictions of the courts, are the following:

Sec. 2, clause 7. "* * * Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

The 23rd section has reference exclusively to the courts in which suits may be brought and is as follows, viz:

"*a.* The United States Circuit Courts shall have juris-

diction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustee, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had between the bankrupts and such adverse claimants."

"*b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

"*c.* The United States Circuit Court shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

In *Carter vs. Hobbs*, 92 Fed. Rep. 594, the plaintiff, trustee in bankruptcy, filed a bill in the District Court of the United States for the District of Indiana to set aside fraudulent transfers of property, and the defendant filed a demurrer to said bill, alleging that the Court was without jurisdiction in the premises. Judge Baker over-ruled the demurrer and filed a written opinion, in which he declared that a fair considerasion of section 23*b* of the Bankrupt Act of 1898 cannot be regarded as ousting the court sitting in bankruptcy of jurisdiction; the grant of jurisdiction by the 2nd clause, omitting the exception in clause 7, is ample and would be exclusive in collecting and reducing to money and distributing the estate of the bankrupt of whatever nature. Section 23*b* is doubtless intended to be the exception engrafted in section 2, clause 7. The Judge said:

> "Omitting the exception, it is clear that by Section 2 the District Court sitting in bankruptcy would be invested with original and exclusive jurisdiction, unless it gave leave to parties to sue in the courts of

the State, over the collection of all debts and demands due the bankrupt, as well as the entire administration of the bankrupt's estate, and the administration of all controversies relating thereto. It is, however, earnestly contended that clause B of Section 23, with which we are alone concerned, takes from the bankruptcy court and remits to the State courts of the State, jurisdiction over all suits for the collection of debts and demands due the bankrupt, as well as of all suits to set aside fraudulent transfers of every sort, and to recover the property of bankrupts in the wrongful possession of third parties. In short, that the bankruptcy court has no jurisdiction to "cause the estates of bankrupts to be collected" and reduced to its possession. If the bankruptcy court possessed no jurisdiction over these matters, it is shorn of power to accomplish the purpose of its creation; and it is impotent, indeed, if it must rely upon the courts of the State to perform the largest and most important part of the work of administering the Bankruptcy Act. Such, in effect is the ruling in *Burnett vs. Morris Merchantile Co.*, 91 Feb. 365, where it is held that the District Court has no jurisdiction to entertain a suit to set aside conveyances made by the bankrupt in fraud of his creditors. But this broad construction of clause *B* is inadmissable. It of course is to be construed in connection with every part of Section 2, which contains the plenary grant of jurisdiction to the District Court sitting in bankruptcy. It takes out of the plenary grant of jurisdiction that which otherwise would be within it. But such a construction of an exception that makes it plainly repugnant to the body of the Act is not permissable. *The Dollar Savings Bank vs. United States*, 19 Wall. 227. The general rule of law is that an exception only carves some special matter out of the body of the Act; and those who set up such an exception must establish it,

as being within the words as well as the reason therefor. *Ryan vs. Carter*, 93 U. S. 78; *United States vs. Dickson*, 15 Pet. 141. The language of clause *B* must be strictly construed to avoid repugnancy between it and the plenary grant of jurisdiction conferred by Section 2. The application of these settled rules of construction leaves no doubt that the clause of Section 23 under consideration does not divest courts of bankruptcy of jurisdiction over suits brought by the trustee to set aside fraudulent transfers of the bankrupt. The clause in question requires suits which the bankrupt might have brought or prosecuted to be brought in the courts in which the bankrupt must have brought them if bankruptcy had not supervened. It seems to be clear that where the trustee brings a suit to enforce a right of action which never existed in the bankrupt, the District Court has ample jurisdiction to maintain it. The trustee's right of action in such a case is not a derivitive one, growing out of a prior right possessed by the bankrupt, but his right is original, created by law, and in the enforcement of it he represents the creditors, and his suit is in effect the exact equivalent of a creditor's bill to reach property fraudulently transferred. Such a suit could never have been brought or prosecuted by the bankrupt against himself and his fraudulent transferees. No State Court could entertain jurisdiction over such a suit when attempted to be brought or prosecuted by the bankrupt; and no such construction of clause *B* is admissable. When suits which the bankrupt could have brought or prosecuted in the courts of the States are spoken of, evidently real suits upon existing causes of action belonging to the bankrupt are meant, and not suits for the pretended enforcement of causes of action which never existed in favor of the bankrupt. Whether District Courts have jurisdistion over suits to recover debts and demands due and

owing to the bankrupt at the time of the adjudication of bankruptcy, it is not necessary to consider or determine. On this question, however, see *In re Sievers*, 91 Fed. 366."

Judge Amidon:

In *re Woodbury*, 98 Fed. Rep. at page 838, held that subdivision *b* of sec. 23 of the Bankruptcy Act of 1898, relates not to the jurisdiction of the courts but to the venue of suits, and in so holding said:

"Under the Federal statutes in force at the time the Bankrupt Act was passed, a defendant, with certain exceptions, not now important, could not be sued in a district of which he was not an inhabitant; and, in case the district was divided into divisions, he could not be sued except in the division of which he was a resident. The object of subdivision "*b*" was to apply this restriction specifically to suits brought by trustees under the Bankruptcy Act. But that Act furnishes still more direct cause for the limitation. Under section 45, the trustee need not be a resident or citizen of the district in which the proceeding is pending; he need only maintain an office in the district. It would frequently occur that a majority of the creditors, especially in the case of insolvent merchants, would be residents of a district other than that of the bankrupt. Take, for example, the States of Wisconsin, Iowa, Indiana and Michigan. It might easily happen that a majority of the creditors of a bankrupt in either of these States would consist of wholesale dealers at Chicago; and such creditors might naturally prefer to place a trustee from their own community, with whom they were personally acquainted, in control of the bankrupt estate. If this should occur it would be possible for the trustee to sue any debtor of the estate from either of the States named in the District of Illinois, if he should be found there; for it

is well established that, when one sues in a representative capacity, it is his own, and not the residence or citizenship of the person represented, that fixes the venue and jurisdiction of Federal Courts. *Coal Co. vs. Blatchford*, 11 Wall. 172. It was this possible hardship that Congress had in mind when it adopted the language contained in subdivision '*b*.' But these statutes forbidding the suing of a defendant in a district of which he is not an inhabitant, or a division of which he is not a resident, create only a personal privilege, which the defendant may waive, and which he does waive unless he makes timely objection. *Improvement Co. vs. Gibney*, 160 U. S. 217. It was to give force to this rule that the last phrase of subdivision '*b*' was employed—'unless by consent of the proposed defendant.' In the light of these considerations, the words in subdivision '*b*', 'in the courts where,' should be given their most obvious sense, as relating to venue, and not be construed as meaning 'in the courts which would possess jurisdiction.' Giving to subdivision '*b*' this construction brings all the provisions of the Bankruptcy Act on the subject into harmony, and also harmonizes the Act of 1898 with previous statutes of the same character, as they have been interpreted by the highest Federal courts."

In *Pepperdine vs. Headley*, 98 Fed. Rep., 863, Judge Phillips held that the District Court of the United States, as a court of bankruptcy, has jurisdiction of a bill in equity by a trustee in bankruptcy against the bankrupt, and a third person to set aside a conveyance made by the bankrupt to his co-defendant on the ground of its being fraudulent as to creditors, although the parties are all citizens of the same State.

In *Louisville Trust Co. vs. Marx*, 98 Fed. Rep., 456, Judge Evans, after a full review of all the cases decided under the Bankrupt Act of 1898, held that the District Court of the United States, as a court of bankruptcy, has jurisdiction of a bill in equity by a trustee in bankruptcy to set aside an alleged fraudulent preference made by the bankrupt; and that Section 23*b* of said bankruptcy act, is a limitation upon the jurisdiction of the Circuit Courts of the United States, and does not affect the jurisdiction of the District Courts, as a court of bankruptcy, conferred by Section 2 of said act.

To the same effect is an opinion by Judge Baker, in *Shutts vs. Bank*, 98 Fed. Rep., 705.

Judge Hawley, in the case of *Norcross vs. Nathan*, 99 Fed. Rep., 415, after a most exhaustive examination of the cases upon the subject, decided precisely as did Judge Phillips in the case of *Pepperdine vs. Headley, supra.*

In *Murry vs. Beal*, 97 Fed. Rep., 567, Judge Marshal held that Section 23*b* of the Bankrupt Act of 1898 is to be strictly construed as being a limitation upon the general grant of jurisdiction to the courts of bankruptcy in other parts of the act; but this provision applies only to suits upon causes of action originally vested in the bankrupt, and which he might have maintained had there been no adjudication in bankruptcy and not suits upon causes of action created by the bankruptcy proceedings, or vested originally in the trustee as trustee: of the latter, the courts of bankruptcy have jurisdiction.

A contrary decision to the above current of authority is the case of *Perkins vs. McKunley*, 98 Fed. Rep., 286.

VII.

What is the import of sec. 26 of the Act in relation to arbitration of "any controversy"? The trustee may submit to arbitration; the number of arbitrators and their mode of selection are designated; and the conclusive effect of their finding is set forth.

This is an arbitration law, unknown to Pennsylvania practice, incapable of enforcement in the state courts and applicable only to the District Courts. Yet if the court below is right in his construction of the law, there never will be "any controversy" in the District Court, which can be subject to arbitration.

The lower court declares that the construction of section 23*b*, contended for by plaintiff in error, is sufficiently answered by saying, "that such a defense goes to defeat the action and not to affect jurisdiction." (Record 8.)

But there is a material difference in pleading between an action brought by a trustee in bankruptcy to recover the value of goods honestly sold by the bankrupt and another brought by him to recover the value of goods transferred in fraud of the Bankrupt Act.

In the latter, the declaration must aver insolvency of the bankrupt; knowledge of such insolvency on the part of the defendant; transfer of the property within four months of the filing of the petition in bankruptcy, &c., &c.

Bump on Bankruptcy (Ed. '98) 786.

The allegations of the declaration in the last case proposed must disclose the jurisdiction of the District Court. If they are wanting the declaration would be demurrable for want of jurisdiction; and the objection could be urged at the inception of the suit.

No declaration has been filed in the case at bar, but the substance necessary to give the District Court jurisdiction of the suit was set forth in plaintiff's answer to the rule to abate the writ. (Record 4).

VIII.

The cases of

Morgan vs. Thornhill, 11 Wall. 75;
Smith vs. Mason, 14 Wall. 430; and
Marshall vs. Knox, 16 Wall. 556;

relied upon by the lower court as authority for this case (Record 5 and 6), certainly do not have the decisive force claimed for them.

Sec. 2 of the bankrupt act of 1867 provided (*a*) that the circuit courts "shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and * * * may, upon bill, petition, or other proper process * * * hear and determine the case as a court of equity."

A subsequent clause of the same section declared that (*b*) "said circuit courts shall also have *concurrent jurisdiction* with the district courts of the same district, of all suits at law, or in equity * * * by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

It is respectfully argued that the lower court is in error in saying that in the above case of *Morgan vs. Thornhill* "it was held that the district court's jurisdiction in a plenary suit was based not on the provision extending jurisdiction 'to the collection of all he assets of the bankrupt,' but to the clause above quoted." (*i. e.* to clause above designated as "*b*.") (Record 5).

In none of those cases was the jurisdiction of the district court mooted, and in none of them was the effect of the clause designated as (*b*) ascribed to it relative to the jurisdiction of the District Court, acting as a court of bankruptcy.

In *Morgan vs. Thornhill, supra*, the District Court had made an adjudication of bankruptcy and granted an injunction in the premises. A petition to review these orders was made to the Circuit Court, under Section 2 of the bankrupt act, and, after hearing, the orders were affirmed. An appeal was then taken to the Supreme Court.

All that this court ruled was that it had no jurisdiction to revise the decree of the Circuit Court, which was merely interlocutory in its nature, and subject to revision at the final hearing.

In *Smith vs. Mason, supra*, this court held that a stranger to the bankruptcy proceeding, claiming absolutely the fund in dispute, not served with process, who has not voluntarily appeared as a party to such litigation, cannot be brought into court upon a rule to show cause.

The assignee in bankruptcy could only proceed against such a party by a plenary suit at law or in equity, as provided in the third clause of the 2nd section of the Bankrupt Act of 1867.

In *Marshal vs. Knox, supra*, the same point was ruled as was decided in *Smith vs. Mason.*

Judge Amidon:

In *re Woodbury*, 98 Fed. Rep., at page 835.

when speaking of Judge Buffington's opinion in the case at bar, says that:

> "The error * * * consists in deriving the jurisdiction of the District Courts from the third clause of section 2 of the bankrupt act of 1867. The federal courts, in construing the act of 1867, uniformly held that full common law and equity jurisdiction was vested in the district courts by section 1 of that act, instead of that part of section 2 which gives to circuit courts concurrent jurisdiction."

IX.

There is another fatal objection to the construction contended for by the lower court in this case, viz:

Under the constitution and the law, Congress cannot compel State courts to assume jurisdiction of the trial of suits necessary to a collection of the assets of the bankrupt estate.

Under the acts of 1841 and 1867, it was ruled by the Federal Courts that the jurisdiction of the Federal and State courts to entertain such suits was concurrent; neither was exclusive of the other in any class of cases.

But the Supreme Courts of Michigan and Wisconsin held otherwise and the cases of

Voorheis vs. Frisbie, 25 Mich. 476;
Brigham vs. Claflin, 31 Wis. 607;

squarely ruled that the courts of those States had no jurisdiction to assist in the settlement of bankrupt estates by entertaining proceeding brought by assignees in bankruptcy to recover the assets and property of the bankrupt estates.

It is true that these decisions were regarded by this court as being against the preponderance of authority.

Claflin vs. Houseman, 93 U. S. 130.

But where is the authority to reverse the above decisions of the Supreme Court of Michigan and Wisconsin?

The law upon this branch of the question is abundantly fortified by authority.

> "The doctrine seems to be admitted that Congress cannot compel a State Court to entertain jurisdiction in any case. It only permits State Courts, which are competent for the purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in the given cases; but they do not become inferior courts in the sense of the Constitution, because they are not or-

dained by Congress. The state courts are left to infer their own duty from their own state authority and organization; but if they do voluntarily entertain jurisdiction of cases cognizable under the authority of the United States, they assume it upon the condition that the appellate jurisdiction of the Federal Courts shall apply." *1st Kent's Com.*, 403.

To the same effect is,

Story on Constitution, U. S., Sec. 1755.

Mr. Justice Clifford gave a full exposition of the law in the case of

Sherman vs. Bingham, 7 N. B. R. 490,

as follows:

* * * * Beyond all doubt Congress in enacting the bankrupt law intended to make it uniform throughout the United States, intended to create or designate tribunals and officers to execute all its provisions; but it is clear that if the supposed defect of jurisdiction exists in the District Courts, that the Act neither creates or designates which is subject to exercise any such jurisdiction. Suppose it to be conceded that such a suit may be prosecuted in the State court, the concession will not give any support to the theory of the defendant, as it is well settled constitutional law that Congress cannot compel a State court to entertain jurisdiction under any act of Congress in any case; that it is optional with them, in all cases, whether to entertain any such jurisdiction or not; that they are left to consult their own duty from their own State authority, and some courts have held that Congress cannot confer any jurisdiction upon the State courts in a matter within the exclusive jurisdiction of the Federal government.

Martin vs. Hunter, 1 Wheat. 330.

"Criminal jurisdiction cannot be conferred upon State courts by an Act of Congress, and it seems to be everywhere admitted, that they are not bound to exercise jurisdiction even in civil cases, and that they may decline to do either if they see fit, or if the laws of the State forbid it.

Stern vs. U. S., 2 Paine (C. C.) 300;
Houston vs. Moore, 5 Wheat. 27."

Upon this branch of our argument, we are upheld by the following language of Judge Amidon

In *re Woodbury*, 98 Fed. Rep., at page 837,

wherein he discusses the power of Congress to entail upon State Courts bankruptcy litigation:

"It would devolve entirely upon State courts the duty of administering the Federal Bankrupt Law, in so far as it relates to the collection of the assets of the bankrupts. This Congress had not the power to do, as had been pointed out by the decisions of the Federal courts in construing the previous bankrupt acts,—a circumstance which furnishes strong reason for believing that Congress did not violate the rule in framing the present statute. While State Courts may exercise a concurrent jurisdiction with Federal Courts in enforcing the rights and duties created by Federal law, it is purely discretionary jurisdiction upon their part, which may at any time be wholly renounced or incumbered with onerous conditions. *Sherman vs. Bingham.*"

We submit, therefore. that the jurisdiction of the Distsict Court, as a court of bankruptcy, in a case like this should be upheld and that the judgment of the lower court should be reversed.

S. Duffield Mitchell,
Thomas Patterson,
Counsel for Plaintiff in Error.

Pittsburgh, Pa., April 4, 1900.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1899.

No. 237.

S. DUFFIELD MITCHELL, Receiver in Bankruptcy of JOSEPH McD. SCOTT, doing business as J. McD. SCOTT & COMPANY, plaintiff, in Error,

vs.

JOHN C. McCLURE and W. REED & COMPANY.

No. 237
October Term,
1899.

Error to District Court of the United States for the Western District of Pennsylvania.

ARGUMENT FOR DEFENDANTS IN ERROR.

J. McD. Scott, the bankrupt, was a citizen of the State of Pennsylvania, residing within the Western District of Pennsylvania, and the defendants were also citizens of said State residing in the same district. So also was the receiver of the bankrupt.

The plaintiff in error's statement is substantially correct. The only question involved in this case is whether or not the District Court of the United States for the Western District of Pennsylvania had jurisdiction to entertain an action which was brought by the receiver of a bankrupt against a party in whose hands he claimed there were assets belonging to the bankrupt; the receiver, the bankrupt and the defendants all being citizens of Pennsylvania, resident in that district.

The section of the bankrupt law involved in this case is Section 23d, and is as follows:

a. "The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as

though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants."

b. "Suits by the trustee shall only be brought or prosecuted in the Courts where the bankrupt whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

A mere reading of this section would seem to make it clear that the action of replevin under consideration could not be maintained in the District Court of the United States because of the citizenship of the bankrupt and the defendants.

The plaintiff in error in the Court below sought to avoid this conclusion by making answer to the rule that he (the plaintiff) had taken the property upon the claim that the same had been conveyed by the bankrupt to defendants without consideration and in fraud of the Bankruptcy Act and of the rights of the creditors of such bankrupt, and that therefore no title had passed to defendants as against the receiver in bankruptcy.

It seem to us that this alleged fact can make no possible difference. In the enactment of the present bankrupt law congress undoubtedly intended

that the defendant in such a case as the present should not be dragged out of his own home into (in many cases) distant Courts of the United States, but that upon the contrary the trustee in bankruptcy should seek the defendant where the bankrupt himself would have had to seek him, namely, at his own residence.

The argument that because the bankrupt cannot maintain a suit to set aside as fraudulent a conveyance made by himself, therefore the provisions of Section 23d of the Bankrupt Law do not apply, is fallacious. Assuming that the bankrupt had brought an action of replevin in the State Courts, to meet the claim in the present case, he could not havs been defeated on the ground that the State Court had no jurisdiction. He could only have been prevented from recovery by reason of the fact that the Court would afford him no relief as against his own fraud. If he could have made a case without disclosing his fraud, in like manner the mouth of the defendant would be closed and he would not have been permitted to set up the fraud to defeat the plaintiff.

Burnett vs. Morris Mercantile Co., 91 Fed. Rep. 365.

The present question was fully discussed in Perkins vs. McCauley, et al., (98 Fed. Rep. 286). The syllabus of that case is as follows:

"Under the Bankruptcy Act of 1898, Section 23, B, providing that suits by the trustee in bankruptcy shall be brought or prosecuted only in those Courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted the Court in Bankruptcy has no jurisdiction in a suit by a trustee to set aside the transfer of property made by the bankrupt and alleged to be in violation of the Act, either as a preference or as a fraudulent conveyance when the bankrupt or trustee and the defendant are citizens of the same State."

The provisions of the Bankrupt Acts of 1841 and 1867 as to the jurisdiction and powers given to Bankrupt Courts are not the same as those of the Act of 1898. They were very much broader. The effect of any decision under those Acts cannot avoid the plain, unmistakable language of the Act of 1898.

The argument drawn from the seventh clause of Chapter II. of the Bankrupt Act, to-wit, that the United States Courts are invested with such jurisdiction at law and in equity as will enable them to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided," has no bearing upon the question now before the Court. The trustee, of course,

is under the control of the Court which appointed him, and can be compelled by that Court to perform his duty. The words "except as herein otherwise provided" clearly relate to the words "determine controversies in relation thereto," and the after proviso is to be found in Section 23.

Hicks vs. Knost, 94 Fed. Rep., 627.

It is argued that Congress cannot compel the State Courts to litigate bankruptcy controversies, and that therefore the language of Section 23d must be twisted from its plain meaning. If the bankrupt had a right of action the fact that he was adjudged bankrupt would not induce a State Court to refuse to entertain a suit brought in his name for the use of his trustee in bankruptcy. If an individual parted with his property with intent to defraud his creditors, even if it be granted that he himself could not successfully maintain an action to recover possession of the property with which he had parted, it is a part of the common law of the land that his creditors could attack such transaction, and it is not to be presumed that any State should so fail in comity as to refuse to entertain an action for that purpose brought by a trustee in bankruptcy, who by the very fact of the adjudication in bankruptcy is vested with all the rights of the creditors for the recovery of their claims against their debtor. It is not at all clear, however, that in such case the State Courts would be without jurisdiction of a suit brought by a trustee in bankruptcy

to recover property which the bankrupt had parted with in fraud of his creditors and in violation of the Bankrupt Act.

The right to institute actions of that nature somewhere must necessarily exist in order to completely administer the estate of the bankrupt for the benefit of his creditors.

The Constitution of the United States, assented to by the several States, confers upon Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States, and it also provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. This latter provision was a necessary provision, because it expresses a mutual and common agreement between the States forming the Union. It was not necessary to make a like expression with reference to the credit to be given to public acts, records and judicial proceedings. That was necessarily implied.

Suppose a judgment was rendered in the United States Court, and that afterwards the parties to the action in which that judgment was rendered became residents of the same State, and it was desirable or necessary to enforce the judgment there: who would contend that an action upon such a judgment could only be brought in the Courts of the United States, or that, if brought in the State

Court, that that Court would not be bound to give full faith to the records of the Court of the United States in which judgment was entered? So in bankruptcy proceedings, when a man has been adjudged a bankrupt and a trustee has been appointed, it is necessarily implied by the record that that trustee, standing for the general body of creditors, has a right to enforce the claims of creditors against the estate of the bankrupt in whosoever's hands it may be found where the bankrupt has parted with that estate in violation of the provisions of the bankrupt law.

"A judgment in one State is conclusive between the parties in another State in the Federal Courts, and the defendants cannot plead any fact in bar which contradicts the record on which the suit was brought."

Insurance Co. vs. Harris, 97 U. S., 33.

But whether or not Congress had a right to require that the State Court shall entertain suits for the objects and purposes of the bankrupt law is immaterial. If Congress undertook to say that certain suits should only be brought in the Court in which the bankrupt could have brought them, and that happens to be a State Court, the remedy is by an amendment of the bankrupt law by Congress, and not through judicial interpolation.

Reference is made to the arbitration provision in Section 26. We fail to see in what way this section helps the contention of the plaintiff in error. It cannot be pretented that the Bankrupt Court can compel either the trustees or his adversary to consent to arbitration. Arbitration is a matter of mutual consent and being so consented to, is brought within the jurisdiction of the Court. And so under Clause "B" of Section 23, if the defendant had consented to a suit against him in the District Court it may well be that that Court would have had jurisdiction, but in this case he did not consent.

Another reason may be urged why Section 23d, in the absence of consent, does not confer jurisdiction, and that is this:

Section 25 of the Bankrupt Act defines the cases in which appeals may be taken, and an appeal in a case such as the present one is not provided for, and it is fair to assume that if such litigation in the District Court had been contemplated, the right to appeal would have been provided for.

It is said that the decision of the District Court in this case cannot be sustained, because Section 23d has no application to a right of action which accrues to the trustees solely by virtue of the bankrupt act; and it is contended that the alleged transfer by the bankrupt to defendants in error without consideration and with intent to defraud his credit-

ors, being an act of bankruptcy within the provisions of the act, is a cause of action created by the act itself, and therefore not within the meaning of Section 23d. It seems to us that this argument is more specious than sound. As we have already said, such a cause of action existed in favor of a creditor at common law. The well known statute of Elizabeth formed part of our common law. If any creditor saw fit to institute proceedings in bankruptcy within four months after the commission of the act, then the right of action which the creditors otherwise would have had, simply was transferred to the trustee in bankruptcy. Wherever receivers have been appointed it has always been recognized to be within the power of the receiver to follow assets fraudulently separated from the body of the estate.

On the whole, then, we contend that the decision of the District Court should be affirmed from the plain reading of the statute in question; that so far as it may be alleged that any inconvenience or delay may attend the administration of bankrupt estates by reason of the limitation of jurisdiction, that that is simply a matter for Congress to remedy, and it is no argument why the decision of the District Court should be reversed.

JOHN S. FERGUSON.

Attorney for Defendants in Error.

BARDES *v.* HAWARDEN BANK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 503. Submitted January 31, 1900. — Decided May 28, 1900.

The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

THE case is stated in the opinion of the court.

Mr. Clarence A. Brandenburg for appellant.

Mr. William Milchrist for appellees.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed April 28, 1899, in the District Court of the United States for the Northern District of Iowa, sitting in bankruptcy, by Fred Bardes, a citizen of Iowa, as trustee in bankruptcy of the estate of Frank T. Walker, (who had by that court been adjudged a bankrupt upon his own petition,) against the First National Bank of Hawarden, Iowa, a corporation created and existing under the acts of Congress relating to national banks, and against citizens of Iowa and of South Dakota, to set aside a conveyance of goods, of the value of $3500, alleged to have been made by the bankrupt, within four months before the institution of the proceedings in bankruptcy, to the defendants, and to compel them to account for the goods or their proceeds, on the ground that the conveyance was in fraud of the provisions of the Bankrupt Act of July 1, 1898, and in fraud of the creditors of the bankrupt. The defendants demurred to the bill, upon the ground that the court could not take jurisdiction of the case. The court sustained the demurrer, and entered a final decree dismissing the bill for want of jurisdiction, but without prejudice to the plaintiff's right to institute proceedings in a court having jurisdiction. The plaintiff took an appeal directly to this court; and the District Judge certified that the bill was dismissed for want of jurisdiction only, and, to the end that this court might be fully advised in the premises, stated in his certificate the following questions as having arisen before him, namely:

"1st. Do the provisions of the second clause of section 23 of the act of Congress, known as the Bankrupt Act of 1898, control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors?

"2d. Can the District Court of the United States under any circumstances entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money

or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy?

"3d. Can this court, being the District Court for the Northern District of Iowa, take jurisdiction over the suit as it now stands on the record?"

The record clearly shows, with perhaps unnecessary fulness, that the case was decided upon questions of jurisdiction only, and what those questions were. *Huntington* v. *Laidley*, 176 U. S. 668, 676, and cases there cited.

At a former day of this term, a certificate made by the District Judge of the same question, on which he desired the instruction of this court for his guidance, was dismissed by this court, because he was not authorized by the acts of Congress to make such a certificate before deciding the case. *Bardes* v. *Hawarden Bank*, 175 U. S. 526.

By the Bankrupt Act of July 1, 1898, c. 541, trustees in bankruptcy, appointed by the creditors of the bankrupt, or by the court of bankruptcy, take the place and are vested with the powers of assignees in bankruptcy under former bankrupt acts. Among the duties imposed upon such trustees by section 47, are to "(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court." By section 70, the trustees, upon their appointment and qualification, are vested by operation of law with the title of the bankrupt, as of the date when he was adjudged a bankrupt, in all his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of his creditors. And by the fifth clause of section 67, "all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid shall, if he be adjudged a bankrupt,

and the same is not exempt from execution and liability for debts by the law of his domicil, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same, by legal proceedings or otherwise, for the benefit of the creditors." 30 Stat. 557, 564, 565.

The present appeal from the final decree of the District Court, dismissing the bill for want of jurisdiction, distinctly presents for the decision of this court the question whether, under the act of 1898, a District Court of the United States, in which proceedings in bankruptcy have been commenced and are pending under the act, has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors. This is a question of general importance, upon which there has been much difference of opinion in the lower courts of the United States.

Its determination depends mainly on the true construction of two sections of the Bankrupt Act of 1898, which it may be convenient to set forth in full, as follows:

"SEC. 2. CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—That the courts of bankruptcy, as hereinbefore defined, viz., the District Courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicil within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicil within the United States, but have property within their

jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts, and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue

such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referee; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and, upon complaints of creditors, remove trustees for cause, upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." 30 Stat. 545.

"SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS. —a. The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"c. The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offences enumerated in this act." 30 Stat. 552.

The question of the effect of these two sections, considering the language of each and their relation to one another, may be best approached by first referring to the terms and to the judicial construction of the Bankrupt Act of March 2, 1867, c. 176,

which was substantially reënacted in the Revised Statutes, and afterwards repealed; and by then comparing the provisions of that act, as so construed, with those of the existing act.

In the act of 1867, the provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity, were as follows:

"SEC. 1. That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." 14 Stat. 517; Rev. Stat. §§ 563, 711, 4972, 4973.

"SEC. 2. That the several Circuit Courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition or other proper process, of any party aggrieved,

hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." 14 Stat. 518; Rev. Stat. §§ 4979, 4986.

In *Lathrop* v. *Drake*, (1875) 91 U. S. 516, the jurisdiction conferred on the District Courts and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of "two distinct classes: first, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." And the jurisdiction of the District and Circuit Courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of section 1 of that act, giving to the District Court original jurisdiction of proceedings in bankruptcy, and of section 2, giving to the Circuit Court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought "by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

In an earlier case, it had been observed by Mr. Justice Clifford, delivering a judgment of this court dismissing an appeal from

a decree of the Circuit Court in the exercise of its supervisory jurisdiction in bankruptcy, that the jurisdiction conferred by the later clause was "other and different from the special jurisdiction and superintendence described in the first clause of the section;" was "of the same character as that conferred upon the Circuit Courts by the eleventh section of the Judiciary Act" of 1789, and was "the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution." *Morgan* v. *Thornhill*, (1870) 11 Wall. 65, 76, 80.

It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend "to the collection of all the assets of the bankrupt," and "to all acts, matters and things to be done under and in virtue of the bankruptcy" until the close of the proceedings in bankruptcy. *Smith* v. *Mason*, (1871) 14 Wall. 419; *Marshall* v. *Knox*, (1872) 16 Wall. 551, 557; *Eyster* v. *Gaff*, (1875) 91 U. S. 521, 525.

The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the act of 1867 upon the Circuit and District Courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the state courts. In *Eyster* v. *Gaff*, just cited, this court, speaking by Mr. Justice Miller, said: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and

that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the state courts."

Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the District Courts and Circuit Courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the Circuit and District Courts of the United States, did not divest or impair the jurisdiction of the state courts over like cases.

The decisions of this court under the earlier bankrupt act of August 19, 1841, c. 9, are very few in number, and afford little aid in the decision of the present case. The one most often cited in favor of maintaining such a suit as this under the existing law is *Ex parte Christy*, (1845) 3 How. 292. But section 8 of the act of 1841 contained the provision (afterwards embodied in section 2 of the act of 1867, and above quoted,) conferring on the Circuit Courts concurrent jurisdiction with the District Courts of suits, at law or in equity, between assignees in bankruptcy and adverse claimants of property of the bankrupt.

5 Stat. 446. And Mr. Justice Story in *Christy's case* considerably relied on that provision. 3 How. 314. Moreover, the only point necessary to the decision of that case was that this court had no power to issue a writ of prohibition to the District Court sitting in bankruptcy; much of Mr. Justice Story's opinion in favor of extending the jurisdiction of that court at the expense of the state courts is contrary to the subsequent adjudication of this court in *Peck* v. *Jenness*, (1849) 7 How. 612; and in a still later case this court, speaking by Mr. Justice Curtis, said that the two former cases "are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression." *Carroll* v. *Carroll*, (1853) 16 How. 275, 287.

We now recur to the provisions of the act of 1898. This act has the somewhat unusual feature of inserting at the head of each section a separate title indicating the subject-matter.

Section 2 of this act is entitled "Creation of Courts of Bankruptcy and their Jurisdiction," takes the place of section 1 of the act of 1867, and hardly differs from that section, except in the following particulars:

First. It begins by describing the jurisdiction conferred on "the courts of bankruptcy" as "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings;" and it ends by declaring that "nothing in this section contained shall be construed to deprive a court of bankrupty of any power it would possess were certain specific powers not herein enumerated."

Second. It specifies in greater detail, matters which are, in the strictest sense, proceedings in bankruptcy.

Third. It includes, among the powers specifically conferred on the courts of bankruptcy, those to "(4) arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;" "(6) bring in and substitute additional persons or parties in

proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

The general provisions at the beginning and end of this section mention "courts of bankruptcy" and "bankruptcy proceedings."

Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words "at law," in the opening sentence conferring on the courts of bankruptcy "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offences, the jurisdiction over which must necessarily be at law and not in equity.

The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties "in proceedings in bankruptcy," and, in clause 15, to make orders, issue process and enter judgments, "necessary for the enforcement of the provisions of this act."

The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to "determine controversies in relation thereto," it is controlled and limited by the concluding words of the clause, "except as herein otherwise provided."

These words "herein otherwise provided" evidently refer to section 23 of the act, the general scope and object of which, as

indicated by its title, are to define the "Jurisdiction of United States and State Courts" in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

The first clause provides that "the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy," (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other,) "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants." This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

But the second clause applies both to the District Courts and to the Circuit Courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, "the courts," as contrasted with the specific words, "the United States Circuit Courts," in the first and in the third clauses.

The second clause positively directs that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, c. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits.

It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

The Bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.

On the contrary, Congress, by the second clause of section 23

of the present Bankrupt Act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, "unless by consent of the proposed defendant," of which there is no pretence in this case.

One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses. See *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 511, 513.

Two or three minor provisions of the Bankrupt Act of 1898, sometimes supposed to be inconsistent with this conclusion, may be briefly noticed.

Section 26 provides that the trustee may, pursuant to the direction of the court of bankruptcy, submit to arbitration any controversy arising in the settlement of the estate, and that the award of the arbitrators "may be filed in court," evidently meaning the court of bankruptcy. But no such arbitration could be had without the consent of the adverse party to the controversy in question.

The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.

The supervisory jurisdiction over proceedings in bankruptcy, conferred by the act of 1867 upon the Circuit Courts of the United States, and by the existing act upon the Circuit Courts of Appeals, does not affect this case. 30 Stat. 553.

For the reasons above stated, we are of opinion that the questions of jurisdiction certified by the District Judge should be answered as follows:

Syllabus.

"1st. The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendants' consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

"3d. The District Court for the Northern District of Iowa cannot take jurisdiction over this suit as it now stands on the record."

The result is that the decree of the District Court, dismissing the bill for want of jurisdiction, must be

Affirmed.

MITCHELL v. McCLURE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 237. Submitted April 12, 1900.—Decided May 28, 1900.

A District Court of the United States has no jurisdiction, without the proposed defendant's consent, to entertain an action of replevin by a trustee in bankruptcy to recover goods conveyed to the defendant by the bankrupt in fraud of the Bankrupt Act and of his creditors.

Bardes v. *Hawarden Bank*, *ante*, 524, followed.

THE case is stated in the opinion of the court.

Mr. Thomas Patterson and *Mr. S. Duffield Mitchell* for plaintiff in error.

Mr. John S. Ferguson for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action of replevin in the District Court of the United States for the Western District of Pennsylvania by a trustee in bankruptcy, appointed by that court, a citizen of Pennsylvania, to recover a stock of goods, of the value of $2500, in the possession of the defendants, citizens of Pennsylvania and residents of that district, and alleged to have been conveyed to them by the bankrupt, within four months before the institution of proceedings in bankruptcy, in fraud of the Bankrupt Act of 1898, and of the creditors of the bankrupt. The District Court, on motion of the defendant, held that it had no jurisdiction to entertain such an action, and therefore ordered it to be abated. 91 Fed. Rep. 621. The plaintiff sued out a writ of error from this court, and the District Judge certified that the question of jurisdiction was the sole question in issue.

For the reasons stated in *Bardes* v. *Hawarden Bank*, *ante*, 524, just decided,

The judgment is affirmed.

HICKS v. KNOST.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 512. Submitted May 14, 1900. — Decided May 28, 1900.

A District Court of the United States has jurisdiction, by the proposed defendant's consent, but not otherwise, to entertain a bill in equity by a trustee in bankruptcy to recover property conveyed to the defendant by the bankrupt in fraud of the Bankrupt Act and of his creditors.
Bardes v. *Hawarden Bank*, *ante*, 524, followed.

THE case is stated in the opinion of the court.

Mr. Charles M. Peck for appellant.

Mr. Frederick Hertenstein for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity in the District Court of the United States for the Southern District of Ohio by a trustee in bankruptcy, appointed by that court, against a creditor of the bankrupts, to recover money to the amount of $2780, paid by the bankrupts to the defendant, with intent to prefer the defendant and to defraud the creditors of the bankrupts, within four months before the institution of the proceedings in bankruptcy. Both parties were citizens of Ohio and residents of that district. The District Court dismissed the bill, for want of jurisdiction. 94 Fed. Rep. 625. The plaintiff appealed to the Circuit Court of Appeals for the Sixth Circuit, which certified to this court the following question:

"Has a District Court of the United States jurisdiction to entertain a bill in equity filed by a trustee in bankruptcy, appointed by it, against a fraudulent grantee or transferee of the bankrupt resident in its district, to recover the property belong-

ing to the estate of the bankrupt, and by him fraudulently conveyed to defendant?"

For the reasons stated in *Bardes* v. *Hawarden Bank*, just decided, the answer to this question must be that the District Court has such jurisdiction by the consent of the proposed defendant, but not otherwise.

Ordered accordingly.